Hastings International and Comparative Law Review

Volume 23
Number 1 *Fall 1999*

Article 2

1-1-1999

The Effect of International Court of Justice Decisions on Municipal Courts in the United States: Breard v. Greene

Sanja Djajic

The Effect of International Court of Justice Decisions on Municipal Courts in the United States: *Breard v. Greene*

BY SANJA DJAJIC*

Table of Contents

* Junior Lecturer, Department for International Law and International Relations, University of Novi Sad School of Law, Yugoslavia; LL.M., University of Connecticut School of Law; Master of International Law, University of Belgrade School of Law; J.D., University of Novi Sad School of Law, Yugoslavia. I would like to express my most sincere gratitude to Professor Joel R. Paul for his support and guidance while working on this article. The support of the Ron Brown Fellowship Program is also gratefully acknowledged.

Introduction

The relationship between international and municipal law is complex and continually developing. One approach to analyze this issue is to look at the interaction between domestic courts and the International Court of Justice (I.C.J.). International courts can deal with issues which may fairly fall under the jurisdiction of municipal courts. Thus, courts from two different levels and legal systems may entertain identical claims. The first question is whether there is any kind of correlation between two types of courts, and if there is, what is its character. If any connection exists, it exists either in a direct interjudicial relationship, or in a more fragmentized relationship involving other actors which link the two courts. This analysis will primarily examine the attitudes of courts of the United States toward the enforceability and legally binding character of I.C.J. decisions. This article will also discuss the question of hierarchy between the judicial decisions, and the questionable power of municipal courts to examine the validity and substance of international decisions.

In the proceedings leading to *Breard v. Greene*,[1] both U.S. courts and the I.C.J. dealt with the same issue—the violation of the Vienna Convention on Consular Relations. This case has shown the relevance of *lis pendens* and the need for a more defined relationship between international and domestic courts. By ignoring the existence of the proceeding before the I.C.J. and its decision directed to the United States and its courts, U.S. courts undermined the authority of the World Court and brought into question U.S. determination to comply with international law.

The temporal connection between the cases in the two courts stressed the problem of the relationship between international and municipal courts. Each court discussed interdependent issues, and each reached an opposite decision. A provisional measures order of the I.C.J. was directed to the matter pending before the U.S. Supreme Court. The Supreme Court refused to comply with the interlocutory decision of the I.C.J., opening the question of the addressee of international decisions in general, and of this order in particular. The consequences were detrimental. The disagreement resulted in the execution of a death sentence and a violation of international law.

Because of the U.S. Supreme Court decision, the main proceeding before the I.C.J., *Vienna Convention on Consular Relations (Para. v. U.S.)*,[2] was discontinued and the World Court did not reach a judgment on the merits. Otherwise, the I.C.J. would probably have indicated more precisely the character of the relationship between municipal and international courts from the international law perspective. However, one may try to discover the nature of this relationship from indirect references in international jurisprudence, regulations and theory.

The U.S. Supreme Court refused to give direct effect to the decision of the International Court of Justice. One can try to trace the reasons for this decision and its possible consequences on international law. It is also possible to take the opposite point of view and determine if there were some other ways the U.S. Supreme Court could have respected the I.C.J. decision without violating U.S. law. The significance of this is even greater as *Breard* was the first death

1. Breard v. Greene, 118 S. Ct. 1352 (1998).

2. On April 3, 1998, Paraguay brought a case against the United States and requested the indication of provisional measures. 1998 I.C.J. 266 (Apr. 9). The case was removed from the list on November 10, 1998 in accordance with Paraguay's request for discontinuing the proceeding. 1998 I.C.J. 426 (Nov. 11).

penalty case to reach the World Court.[3] *Breard* announced a new type of international case. It was followed by the *LaGrand* case (F.R.G. v. U.S.)[4] which also showed an acute, methodical unwillingness to comply with both the *Vienna Convention on Consular Relations (Para. v. U.S.)* and I.C.J. decisions. These decisions also revealed a pattern of systematic violations of the Consular Convention in the United States, confirmed by *United States v. Lombera-Camorlinga.*[5]

The issues in *Breard* can be placed in a larger framework in order to illustrate the intersection of the international and domestic legal orders and their complexity. These issues are the obligation of municipal courts to take into account I.C.J. decisions; state responsibility for the acts of its courts; the interpretative methods of the U.S. courts and the I.C.J.; methods for enforcing I.C.J. decisions, including the question of general international law enforceability; the effect of the decisions of municipal courts on I.C.J. proceedings and international law; the potency of domestic doctrines for international law implementation and its application in this case; human rights considerations in the horizontally structured international system; the validity of domestic legal arguments before the I.C.J. and vice versa; and the ways to reconcile conflicting attitudes and enable full compliance with international law.

This article argues that there were other possible solutions for *Breard* and that various international and domestic legal arguments could have been employed to reach a less damaging outcome. The first part of this article will focus on the international and U.S. law perspectives on the validity and enforcement of I.C.J. decisions, particularly provisional measures orders. The second part will analyze U.S. constitutional arguments, so that the search for another solution can focus exclusively on domestic grounds and avoid

---

3. *See* Peter Bekker & Keith Highet, *International Court of Justice Orders U.S. to Stay Execution of Paraguayan National in Virginia,* NAT'L B. A'SSN. MAG., Apr. 12, 1998, at 37.

4. Germany instituted proceedings against the United States for the alleged violation of the Vienna Convention on Consular Relations on March 2, 1999. The I.C.J. issued a Provisional Measure on March 3, 1999, obliging the United States to do what it was supposed to do in the *Breard* matter—stay the execution. 1999 I.C.J. 9 (Mar. 3).

5. 170 F.3d 1241 (9th Cir. 1999); *see generally Court Upholds Rights of Foreign Defendants to Consular Advice,* N.Y. TIMES, Mar. 28, 1999, at 37 ("'Hopefully, [this case will] end a systematic violation of the treaty that's been going on for 30 or 35 years,' Mr. Coleman [the public defender in this case] said.").

international law counter arguments. The U.S. legal system offers many possible resolutions for this type of case, with the executive branch being a key factor. The third part argues that human rights perspectives should not have been excluded in the U.S. courts as they offer very strong and enforceable arguments. The fourth part introduces the concept of comity as a potent and useful argument in cases that raise international concerns. Finally, the fifth part is devoted to the character and inconsistency of the legal arguments used in *Breard*, and argues that their compatibility could have been achieved for different policy reasons, with the outcome beneficial for all actors in this drama.

A. The Breard *Case*

Angel Francisco Breard was a 32-year-old citizen of Paraguay who had come to the United States in 1986. In 1993, a Virginia jury convicted Breard of the attempted rape and capital murder of Ruth Dickie. The State of Virginia scheduled the execution of Breard for 9:00 p.m. on April 14, 1998. On April 3, 1998, Paraguay filed an application with the I.C.J. Registry alleging violations by the United States of the Vienna Convention on Consular Relations of 1963.[6] These violations stemmed from the failure by the Commonwealth of Virginia to advise Breard of his right to communication with, and receive assistance from, the consular officers of Paraguay, as required by Article 36(1)(b) of the Vienna Convention.[7] Paraguay submitted a request for a provisional measures order seeking the re-establishment of the status-quo-ante situation that existed before the United States violated international law by not providing the notification with respect to the consular service as required by the Vienna Convention.[8]

At Breard's trial in 1993, the prosecution presented potent

6. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. Paraguay's accession became effective on December 23, 1969; the United States signed the Convention on April 24, 1963 and ratified it effective November 24, 1969.

7. Article 36 of the Vienna Convention provides that a detained foreign national must be informed of his right to communicate with consular officials and grants consular officials the right to visit with a detained national and to arrange for his legal representation. *Id.*

8. After filing its application on April 3, 1998, Paraguay also submitted on the same day an urgent request for the indication of provisional measures in order to protect its rights. Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 266 (Apr. 9).

evidence of guilt. Furthermore, Breard admitted guilt. The Virginia Supreme Court affirmed Breard's convictions and sentences and the U.S. Supreme Court denied certiorari. The Virginia courts later denied Breard collateral relief. In August, 1996, Breard sought federal habeas corpus relief. In his petition to the federal court, he claimed that the sentence and convictions should be overturned as they violated the Vienna Convention on Consular Relations. He alleged, for the first time since the proceedings started in 1993, that the U.S. authorities had failed to notify him that, as a foreign citizen, the Convention afforded him the right to contact the Paraguayan Consulate. The district court denied relief, concluding that Breard had procedurally defaulted on this claim when he failed to bring it up in state court and that he could not show "cause and prejudice" for this default, as required by law. The United States Court of Appeals for the Fourth Circuit affirmed.[9] Breard then sought certiorari from the U.S. Supreme Court. Meanwhile, Paraguay sought relief for the violation of the Vienna Convention by suing various Virginia officials in federal district court, claiming that their actions violated Paraguay's contractual rights under the treaty. The Consul General also raised a parallel section 1983 claim[10] alleging a denial of his rights under the *Convention*. The district court dismissed the case on the grounds that there was no subject matter jurisdiction over these suits because Paraguay was not alleging a "continuing violation of federal law" and could not bring itself within an exception to Virginia's Eleventh Amendment immunity from suit. The United States Court of Appeals for the Fourth Circuit affirmed. Paraguay also sought a writ of certiorari from the U.S. Supreme Court.

Meanwhile, Paraguay instituted proceedings before the I.C.J.,[11] which ordered provisional measures asking the United States to "take

9. *See Breard v. Pruett*, 134 F.3d 615, 620 (4th Cir. 1998).

10. 42 U.S.C. § 1983 enables ambassadors and consuls to have a cause of action for the violation of an international treaty, in this case the Paraguay-U.S. Treaty of Friendship, Commerce, and Navigation, if they assert their own rights, or rights of their country, which must be different from the right already decided by the court (here, their rights were different from the rights of Breard). The district court held that Paraguay and its officials had standing to bring their claims under the Convention.

11. This proceeding was instituted by Paraguay's application on April 3, 1998, but was discontinued and removed from the court's list on November 10, 1998, due to Paraguay's withdrawal from the proceeding. *See* 1998 I.C.J. 426 (Nov. 10) (Order of 10 November 1998, Discontinuance by the Republic of Paraguay of the Proceedings Instituted by the Application Filed on April 3, 1998).

all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings."

Breard then sought an original writ of habeas corpus and a stay of execution from the U.S. Supreme Court. Paraguay petitioned to file an original action in that Court as a case affecting foreign consuls. The U.S. Departments of Justice and State informed the Supreme Court that provisional measures orders are not binding under international law, and urged the Court to deny any legal effect of the I.C.J.'s decision. On April 14, the Supreme Court denied the petition for habeas corpus and both petitions for certiorari. In doing so, the Supreme Court did not admit the legal effect of an I.C.J. decision before the U.S. municipal courts. On April 13, the Secretary of State had sent a letter to the Governor of Virginia asking him to stay the execution. This request was refused, and Breard was executed on April 14, 1999.

It is necessary to note that the order Paraguay requested from the Supreme Court related only to a suspension of the execution while the proceeding before the I.C.J. was pending. Paraguay sought the restoration of the situation before Virginia violated the Vienna Convention, which can be described as a request for *restitutio in integrum*. In addition, the request could be expanded to reparations for the alleged violation of the international treaty. The scope of the order may be seen as a demand for the temporary suspension of the execution while the I.C.J. concluded its proceedings on the merits. In any case, neither the order nor the fact that there was a proceeding pending was directed towards the criminal responsibility of Breard. The I.C.J. documents concerning provisional measures were not aimed at the substantive administration of criminal justice regulated by U.S. law.[12]

B. The Legal Issues Raised by the U.S. Supreme Court in Breard

Paraguay's diplomatic interventions and attempts to seek relief in the U.S. courts raised important international law questions.[13] This case certainly involved the problems of the conduct of foreign affairs

12. "At the same time, the Court made it clear that the case does not concern the right of . . . states to resort to the death penalty and that the Court's function is to resolve international legal disputes between sovereign states and not to act as a universal supreme court of criminal appeals." Bekker & Highet, *supra* note 3, at 38.

13. *See* Breard, 118 S. Ct. at 1357 (Stevens, J., dissenting); *see also id.* (Breyer, J., dissenting).

and compliance with treaty obligations arising from the Vienna Convention on Consular Relations. It seems that the international legal norms stemming from the Vienna Convention were not the only norms of that character that were at stake. Furthermore, this was not even the only treaty to be breached since Virginia may also have violated the U.N. Charter and I.C.J. Statute. This case also raised other issues, including the legal validity of I.C.J. decisions in U.S. courts, the interpretation of treaties and customary international law, the treatment of the separation of powers and federalism within the U.S. legal system when dealing with foreign affairs issues, and the protection of international human rights in U.S. courts. Public opinion on both the national and international levels is a separate issue here. Also, the humanitarian aspects relating to the execution of this death sentence, in the environment of the challenged legality of its enforcement, contributed to the importance of this situation. Thus, the *Breard* decision raised numerous independent international issues.

I. The Arguments Pertaining to the Binding Force of ICJ Decisions and the Consequences of Non-Compliance

In order to argue that international decisions are enforceable in national legal systems, one must first prove that a particular decision is binding in the system from which it comes. As the violation of the Vienna Convention initiated the proceeding before the I.C.J., Paraguay's and Breard's allegations in U.S. courts were put in an international legal framework.

This is how the issue gained different dimensions on the international plane with possible domestic effects. The reverse is also true, as the I.C.J.'s entry of interim measures decisively changed the legal situation with regard to the pending domestic proceeding. First, the implications are not restricted to Paraguay and the United States alone as the I.C.J. was involved. Second, the issue was clear cut as the problem was shifted from treaty implementation to court compliance with an international decision. The I.C.J.'s intervention interrupted the exclusively bilateral and reciprocal legal relationship between the United States and Paraguay. This might be viewed as a new form of bilateral relationship between the I.C.J. and the state in question. Even more, as the I.C.J. speaks on behalf of the international community and international legal order, the relationship between the parties becomes more complex, giving it a bilateral-multilateral

character. However, it is important to note that the Supreme Court referred to the pending case before the I.C.J. as an irrelevant fact, only mentioning the existence of the order without further comment.

Beginning on April 9, 1998,[14] the international issue became more specific and amounted to whether U.S. courts were obliged to respect this order. Because the Supreme Court refused to give legal effect to the I.C.J. order on provisional measures with respect to the pending proceeding before the I.C.J., the subject matter of which was directly connected with *Breard*, I shall first examine the legal validity of this order, from both an international and U.S. perspective.

A. The International Law Perspective

Provisional measures are envisaged in Article 41 of the Statute of the I.C.J.[15] and in Articles 73-78 of the Rules of the Court.[16] These articles give the court power to prescribe measures that need to be taken in order to preserve the rights of either party. Such judicial power is not a *sui generis* characteristic of the World Court, as it originates in domestic legal systems.[17]

The main purpose for provisional measures is to preserve the rights which are the subject matter of the dispute before the I.C.J. in order not to make the complete procedure meaningless before it is ended.[18] But there are other important goals and functions of the provisional measures. One function is to give a correct and adequate

14. This was the date when the I.C.J. entered the order on provisional measures that indicated the obligation of the United States to take all measures at its disposal to ensure that Angel Francisco Breard not be executed, pending the final decision in these proceedings, and to inform the court of all the measures which it was supposed to take in implementation of the order. *See* 1998 I.C.J. 266 (Apr. 9).

15. Statute of the I.C.J., art. 41, June 26, 1945, 59 Stat. 1031, 1 U.N.T.S. at xvi. ("The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.").

16. 1978 Rules of the Court. The 1946 and 1972 Rules referred to the provisional measures as "interim measures of protection." The revision of the Court Rules in 1972 brought the terminology of the Statute and Rules into line. *Interim Protection*, 1978 I.C.J. Rules of the Court, arts. 73-78.

17. *See* Rosenne Shabtai, THE WORLD COURT: WHAT IT IS AND HOW IT WORKS 96 (1995) ("This enables the Court to take steps roughly corresponding to an interim injunction which domestic courts are frequently empowered to issue pending the final determination.").

18. *See* H.W.A. Thirlway, *The Indication of Provisional Measures by the International Court of Justice, in* INTERIM MEASURES INDICATED BY INTERNATIONAL COURTS 7-8, (Rudolf Bernhardt ed., Springer Verlag 1994).

response to an urgent situation which may be a threat to the international rights of states and the proceedings before the I.C.J. Another function is to prevent irreparable damage. The provisional measures are also designed to prevent the extension of a dispute and the preservation of evidence[19]. The I.C.J. has been very clear in interpreting Article 47, explaining the nature and functions of the provisional measures:

> Whereas the right of the Court to indicate provisional measures as provided for in Article 41 of the Statue has as its object to preserve the respective rights of the Parties pending the decision of the Court, and presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings, and that the Court's judgment should not be anticipated by reason of any initiative regarding the measures which are in issue . . . .[20]

The following pronouncement is to similar effect:

> Whereas the power of the Court to indicate provisional measures under Article 41 of the Statue of the Court has as its object to preserve the respective rights of the parties pending the decision of the Court, and presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings . . . .[21]

A provisional measures order is an interlocutory decision which cannot prejudice the final outcome of the case;[22] the decision on substantive questions is reserved for the final judgment on the merits. The interlocutory character of the provisional measures order does not deprive it of its judicial character and corresponding attributes of other I.C.J. decisions. Therefore, a provisional measures order can be viewed either as an I.C.J. order distinct from other I.C.J. decisions, or as an order which fairly falls in the category of judicial decisions and

---

19. *See id.* at 8-16.

20. Fisheries Jurisdiction, 1972 I.C.J. 16, 34.

21. Passage through the Great Belt (Fin. v. Den.), 1991 I.C.J. 12 (July 29).

22. *See* 1973 I.C.J. 123, 158 *appended to* Order of June 22, 1973 (dissenting opinion of Gros, J.) ("Here we have a condition of general scope for the interpretation of Article 41 of the Statue of the Permanent Court of International Justice, which was identical to the present Article 41, and the recognition of a procedural requirement operating in regard to interlocutory jurisdiction. For it would indeed, by a definition, be contrary to the nature of interlocutory proceedings if they enabled the dispute of which they were only an accessory element to be disposed of.").

acquires all characteristics prescribed for them by the U.N. Charter, I.C.J. Statute, and Rules of the Court.

The general issue is to what extent provisional measures are binding on the state to which they are directed. International law theory supports the notion that the orders are binding.[23] Differences that arise stem from different concepts of such validity and further entail the character of the state's obligation. There are two possible approaches, as mentioned above: (1) An order is binding as a matter of treaty law; or (2) Its binding character stems from general international law.

1. Orders Are Binding as a Matter of Treaty Law

The Statute of the I.C.J. is a multilateral treaty that gives the court power to articulate binding measures. Under this approach, the order can be viewed as the result of a two-step procedure regulated by the Statute. First, parties to the treaty consented to the Statute. Although not all states ratified the *Convention*, it still represents an authoritative source and many countries refer to it as evidence of customary treaty law[24]. By consenting to a treaty, a state becomes bound by all provisions envisaged in it. Consent invests a treaty with legal force limiting the parties' sovereignty to the extent they find suitable, and in a manner consistent with international law. Treaties have to be respected in order to honor the will of the states. If the will of a state changes, the state may withdraw from the treaty.[25] The I.C.J. Statute, as a multilateral treaty, gives the court the power to indicate provisional measures under certain circumstances. When such circumstances arise, the I.C.J. is expected to act accordingly.

---

23. *See* Thirlway, *supra* note 18, at 29.

24. The Restatement (Third) of the Foreign Relations Law of the United States "accepts the Vienna Convention as, in general, constituting a codification of the customary international law governing international agreements." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW PT. III Intro. Note (1986).

25. It might not be difficult to advocate the approach by which state consent may not exist at the time of an undesirable proceeding. Having such a dilemma, we may find ourselves addressing the question of the nature of international law. In order to preserve its legal character and to be distinguished from morality and politics, it must meet two conditions: normativity and concreteness. "To show that an international law exists, with some degree of reality, the modern lawyer needs to show that the law is simultaneously normative and concrete—that it binds a State regardless of that State's behavior, will or interest but that its content can nevertheless be verified by reference to actual State behavior, will or interest." Koskenniemi Martti, *From Apology to Utopia: The Structure of International Legal Argument*, LAKIMIESLIITON KUSTANNUS (Helsinki 1989), at 2.

As a party to the I.C.J. Statute and the U.N. Charter, the United States must comply with an I.C.J. order. The order on provisional measures in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, in the opinion of S. O. Ajibola, supports this assertion:

> At this point, it is important to state the provision of Article 94 of the Charter, which reads:
>
> > Each member of the United Nations undertakes to comply with the *decision* of the International Court of Justice in any case to which it is a party.
> >
> > If any party to a case fails to perform the obligation incumbent upon it under a *judgment* rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.[26]

The word "decision" in Article 94 of the U.N. Charter embraces all decisions entered by the court, including interlocutory decisions such as an order on provisional measures.[27] The purpose of Article 94 was clearly to uphold the authority of the I.C.J. in the full exercise of its competence.[28] Since an order is not a judgment, it cannot attract the effect of *res judicata* as is envisaged in Article 59 of the I.C.J. Statute. The decision of the court can be seen as a valid treaty obligation. Under this theory,

> the reception of the judgment is already preceded by the reception of a rule of international law, namely Article 94 of the U.N. Charter and Article 59 of the ICJ Statute, so that the reception of the international judgment is founded on the reception of international law which has taken place earlier.[29]

Moreover, other reasons exist for respecting orders with some reference to the legal effect of the court's final judgments. Most importantly, the order deals with an incidental question that will not

---

26. 1993 I.C.J. 401 (emphasis added).

27. "It seems that the word 'decision' in the Charter refers to all decisions of the Court, regardless of their form." SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT OF JUSTICE 125 (1965).

28. *See* Henry J. Richardson III, *The Execution of Angel Breard by the United States: Violating an Order of the International Court of Justice*, 12 TEMP. INT'L & COMP. L.J. 121, 127 (1998).

29. Mohammed Bedjaoui, *The Reception by National Courts of Decisions of International Tribunals*, 28 N.Y.U. J. INT'L L. & POL. 45, 52 (1996).

influence the final outcome of the case. This circumstance, however, does not deprive it of the authority of a judicial decision. Shabtai Rosenne explains this connection as follows:

> In practice the consequences of conduct of this nature may be virtually indistinguishable for a *res judicata*. The effect of the non-creation of a *res judicata* is simply that the substantive rights of the parties are unaffected by the order, save to the extent that where the Court relied on certain facts stated to it by one or both parties, the conduct of that party may debar it from denying its statements in a later stage.[30]

This interpretation may help to distinguish the authority of the Court's decisions, depending on whether they stem from form or substance. The substance of the provisional measures order poses little danger to states because it can influence neither the question of state responsibility nor the substantive legal issues, whatever its specific direction may be. Nevertheless, the issuance of an order may form the grounds for responsibility *pro futuro* if it is not complied with. Therefore, compliance with a provisional measure order cannot harm states; it simply serves to effect the proper administration of international justice.[31]

One may therefore conclude that the conception of states as parties to an international treaty supports the binding character of provisional measures orders.[32] Several articles are implicated: Articles 25,[33] 94,[34] and 103[35] of the U.N. Charter, and Articles 30, 38,

---

30. 2 SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT OF JUSTICE 632 (2d ed. 1985).

31. The problem that may arise here is the fact that non-compliance with a provisional measures order does not induce either sanctions or procedural disadvantages (as it does in cases of, e.g., non-appearance). One may dispute the binding character of provisional measures order due to the absence of sanctions. Nevertheless, this argument is valid only if the Austinian model of law is accepted as authoritative, valid and possible.

32. Thirlway strongly advocates this approach as the only possible one if provisional measures orders are to be seen as binding. *See* Thirlway, *supra* note 18, at 1-36.

33. "The Members of the United Nations agree to accept and carry out the decision of the Security Council in accordance with the present Charter." U.N. CHARTER art. 25.

34. *See supra* note 21.

35. "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." U.N. CHARTER art. 103.

41 and 59 of the I.C.J. Statute.[36]

2. Orders Are Binding Under General International Law

General international law gives legal effect to I.C.J. orders as binding on states. Consensus holds that the sources of international law are mainly embraced in Article 38 of the I.C.J. Statute.[37] When considered together with international treaties, this means that customary international law and general principles of law may be considered. Some authors have specified the particular source they consider to be the ground for provisional measures, but frequently authors refer only to general international law without making this distinction. J.B. Elkind provides a good example of this first approach:

> It is the central theme of this book that the power to indicate interim measures is "a general principle of law recognized by civilized nations" and that it is hence a principle of general international law under Article 38(1) (c) of the Statute. As such a principle, interim measures indicated by the Court are binding.[38]

On the other hand, some authors find customary international law to be a more appropriate basis for supporting the binding character of I.C.J. decisions.[39] Nevertheless, others find those distinctions irrelevant, citing only general international law as grounds for the binding effect of provisional measures. Examples from the jurisprudence of the I.C.J. support this:

> [T]he binding nature of an order is inherent in itself. It imposes a positive obligation recognized by international law. Whether such an order is complied with or not, whether it can be enforced or not, what other sanctions lie behind it—all these are external questions, not affecting the internal question of inherent validity.[40]

Similarly:

---

36. There are also corresponding articles of the I.C.J. Rules (Articles 73 through 78), but they largely concern the technical and procedural aspects of provisional measures. The I.C.J. has the power to enact the rules of procedure under Article 30 of the I.C.J. Statute (pertaining to incidental jurisdiction).

37. *See, e.g.,* M. SHAW, INTERNATIONAL LAW 58 (2d ed. 1986); BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 2 (1966); HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE 601 (1934).

38. B. JEROME, INTERIM PROTECTION: A FUNCTIONAL APPROACH 162 (1981).

39. *See, e.g.*, Rosenne, *supra* note 27, at 127.

40. Application of the Convention on the Prevention and Punishment of the Crime of Genocide, 1993 I.C.J. 374 (Weeramantry, J.) [hereinafter Weeramantry].

> The Court, as I would further point out, has this power under the Statute and Rules, so that it also forms a part of its inherent power under general international law. Otherwise it may be impeded from functioning as a Court.[41]

Some authors consider the incidental jurisdiction of the Court to issue provisional measures, as well as the legal effect of such an order, as an inherent characteristic to all institutions performing judicial functions.[42]

Putting aside for a moment the general question of the legal validity of provisional measures orders, other, more specific questions must be addressed. The first question relates to the fact that international legal theory and practice, to a certain extent, distinguish between the binding force and enforceability of provisional measures. "Confusion has arisen in legal writings on the issues of enforceability and the binding character of provisional measures. These two problems must be treated separately, since it is possible that the measures can be binding without being enforceable."[43]

This may help illuminate the transition of international prescription into municipal legal systems.[44] I.C.J. jurisprudence is helpful in that respect as well:

> As the lack of mechanisms for enforceability sometimes clouds discussions of the binding nature of the orders of this Court, a consideration of the binding nature of provisional measures must start with the clear distinction that exists between the question of the legal obligation to comply with an order and the question of its enforcement. The fact that an order cannot be enforced does not in any manner affect its binding nature, for the binding nature of an

---

41. *Id.* at 406 (Ajibola, J.).

42. *See, e.g.*, Rosenne, *supra* note 27, at 427 ("There is sometimes said to exist a generally recognized principle according to which the institution of judicial proceedings itself operates as a provisional measure of protection, since the parties are under an implied obligation, until the Court has reached its decision in the case, to refrain from any steps which might have a prejudicial effect on the execution of the Court's final decision, or which might exacerbate the dispute.").

43. E. Hellbeck, *Provisional Measures of the International Court of Justice—Are They Binding?*, 9 ASILS INT'L L.J. 169, 176 (1985).

44. Mohammed Bedjaoui, *The Reception by National Courts of Decisions of International Tribunals*, 28 N.Y.U. J. INT'L L. & POL. 45, 56 (1995-1996) ("It should be added that the foregoing analysis has the advantage of enabling a distinction to be drawn more readily between the enforcement of an judicial decision and its reception. Enforcement signifies the implementation of the judicial decision as an instrumentum, i.e., in terms of its formal entirety. The reception we are talking of looks at the judicial decision as a negotium, i.e., in terms of its substantive content.").

order is inherent in itself.[45]

Weeramantry continues:

> When this Court, duly acting within its authority and jurisdiction, indicates provisional measures, it is in the expectation that those measures will be complied with, in accordance with international law. Their violation must therefore be viewed with great concern. The question of the obligation to comply must at all times be sharply distinguished from the question of enforceability.[46]

This distinction appears to settle the matter in two opposite directions—international decisions have binding force in the international sphere, but enforcement of the decisions takes place outside of the international sphere. Nevertheless, these two different features may complement each other. Moreover, this distinction explains the structure of the international legal system and offers possible solutions for the enforcement of international law. As a result, another question hidden in this conundrum might be answered. The decision is directed to a respondent state as an indivisible entity from the international law enforcement standpoint. The court may choose to address the responsible branch of government or to leave this to the state to decide. Considering the aforementioned distinction between binding force and enforceability, it seems that the court communicates with a state on the level of international relations, an appropriate method for two international entities. The court prescribes an "assignment" to a state as legally binding; the state decides how to enforce the particular I.C.J. decision.

The second question relates to the determination of the character, scope, and extent of a state's obligation when it is an addressee of provisional measures orders. This depends on the concrete language and how it can change the general obligation to comply with I.C.J. orders. The character of the obligation outlined in the order is not irrelevant. Obligations are different for, on the one hand, generally formulated decisions that amount to undertakings of certain activities regardless of their outcome,[47] and, on the other hand,

---

45. Weeramantry, *supra* note 40, at 374.

46. *Id.* at 375.

47. *See* U.S. Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1979 I.C.J. 21 ("The Government of the Unites States of America and the Government of the Islamic Republic of Iran should not take any action and should ensure that no action is taken which may aggravate the tension between the two countries or render the

precise and direct decisions.[48] In the latter case, the way in which the compliance with international law is supposed to be achieved is clear.

The third question concerns the overwhelming non-compliance with provisional measures and the danger that this may affect arguments for their legally binding character. One may illustrate this dilemma by the following statement: "Furthermore, the Vienna Convention recognizes the relevance of State practice in interpretation, just as much as that of the *effet utile.*"[49] A strong argument may be made that interim measures are binding.[50]

3. Provisional Measures, Order of April 9, 1998, Vienna Convention on Consular Relations (Para. v. U.S.)

The I.C.J. unanimously decided to grant provisional measures as Paraguay had requested, having found that the conditions for indicating provisional measures were fulfilled. What must be stressed at the beginning is the difference between the substantive elements of the case as a whole and the provisional measures of the I.C.J. The scope and extent of this order was limited to (a) the prevention of the execution of Angel Francisco Breard pending the final decision in the proceeding before the I.C.J., and (b) the obligation of the United States to inform the court of all measures taken in implementing the order. Although Paraguay emphasized the importance of some aspects of the case at this stage, it was more a review of the previous proceeding; the court could not have taken them as arguments due to

---

existing dispute more difficult of solution."); *see also* Military and Paramilitary Activities (Nicar. v. U.S.), 1984 I.C.J. 186-87 (May 10) (containting the complete operative part of the order); 1993 I.C.J. 24 ¶ 52(A)(1) ("The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should immediately, in pursuance of its undertaking in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, take all measures within its power to prevent commission of the crime of genocide.").

48. *See* 1979 I.C.J. 21 § A. In *Vienna Convention on Consular Relations (Para. v. U.S.)*, the court ordered

> (a) That the Government of the United States take the measures necessary to ensure that Mr. Breard not be executed pending the disposition of this case; [and]
>
> (b) That the Government of the United States report to the Court the actions it has taken in pursuance of subparagraph (a) immediately above and the results of those actions.

1998 I.C.J. 266 (Apr. 9).

49. Thirlway, *supra* note 18, at 151.

50. This opinion holds, so the argument goes, despite assertions that state practice does not support it.

their substantive legal character, save for jurisdictional purposes.[51]

What is particularly important for this case is the clarity with which the obligation is defined in the operative part of the order. Unlike many other cases, in which the language used has tended to be general, here the obligation was very clear in two respects. It referred only to one person who was under the jurisdiction of the defendant state, and the obligation amounted to one specific action—suspension of the execution. Such singularity in the operative part of the court's decision on provisional measures had no precedent.[52] There were no alternative steps that could have outweighed the primary obligation; the "appropriateness" of these measures was not left up to the state. Furthermore, very often the court's ruling has been directed to both parties to restrain them from aggravating the dispute, but such was not the case here.[53]

The language used by the court was specific and clear, avoiding general terms and model-phrases that are often employed in such orders. One may well think that the order could not have been construed more precisely and more narrowly. The request put forward by Paraguay was very clear and direct, trying to avoid the possible trap of condemning substantive aspects of the case. The more precise a request is, the more precise and concrete the counter-argument must be to be effective. Paraguay's request wisely departed from general implications about the U.S. internal system[54] focusing

51. The applicant was obliged to demonstrate its prima facie case.

52. *See, e.g.*, U.S. Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1979 I.C.J. 20 (Provisional Measures Order of Dec. 15); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 186 (Provisional Measures Order of May 10); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.), 1993 I.C.J. 24 (Provisional Measures Order).

53. *See, e.g.*, U.S. Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1979 I.C.J. 20, 20-21 (Provisional Measures Order of Dec. 15).

54. As Mr. Donovan, one of the Paraguayan agents in this case, stated,

> The Court has also stated that provisional measures should not "anticipate" the Court's judgment on the merits. As an initial matter, I should note that the relief that Paraguay seeks on the merits in this case is carefully restrained. . . . Likewise, the provisional measures that Paraguay seeks are carefully limited and in no way anticipate a judgment. Paraguay does not ask, for example, that Mr. Breard be afforded a new trial at this time, or that his conviction and sentence be in any way affected except that the death sentence—the execution—be provisionally suspended. Mr. Breard will remain in custody, and if the United States prevails on the merits in this case, Virginia will be able to go forward with the execution. Thus, the United States can complain of no harm if the Court orders the narrowly

itself on the international aspect of this particular case.[55] On the other hand, arguments proposed by the United States were trying to characterize the issue more generally. Also, the arguments used by the U.S. were more of an internal legal character, quite the opposite to the arguments used by Paraguay.[56] Those arguments were based on the specifics of the internal judicial system, including the separation of powers between governmental branches in the U.S. system; the possibility that the I.C.J. could become a universal supreme court of criminal appeals; the notion that Paraguay was requesting restoration of the *status quo ante* (which was not the request at this stage of the proceeding, but a part of the application reserved for the merits); and the fact that Mr. Breard had admitted his guilt (which Paraguay did not dispute). However, the most important point could not have been argued—that the international treaty had been breached and that the United States admitted that it had.[57]

Each party tried to focus on a different aspect of the case in order to present its strongest arguments. The court entered its

---

tailored provisional measures that Paraguay seeks.

Donovan, Public Sitting on the Request for the Indication of Provisional Measures, Apr. 7, 1998, Verbatim Record, *available at* <http://www.I.C.J.-cij.org/I.C.J.www/idocket/ipaus/ipausframe.htm>.

55. Mr. Donovan noted,

> The crimes with which Mr. Breard is charged deserve the most unequivocal condemnation. On the present state of affairs, individual states of the United States have the authority to express that condemnation in the form of the penalty of death. But even if the death penalty may still be lawfully imposed as a matter of sanction, courts entrusted to uphold the rule of law—on the international level no less than on the municipal level—must be vigilant to ensure the lawfulness, too, of the proceedings by which that penalty is imposed. To exercise that vigilance here, the Court must first indicate to the United States that it must ensure that Paraguay's national is not executed while this case is before the Court.

Id.

56. "[The] Government of the United States . . . emphasized *inter alia* that a stay of execution depended exclusively on the United States Supreme Court and the Governor of Virginia." Order para. 19. "[T]he United States . . . alleged that the indication of the provisional measures requested . . . would in particular be such as seriously to disrupt the criminal justice systems of the State parties to the Convention, given the risk of proliferation of cases . . . ." *Id.* at para. 22.

57. Vienna Convention on Consular Relations (Para. v. U.S.), <http://www.I.C.J.-cij.org/I.C.J.www/idocket/ipaus/ipausframe.htm> (separate declaration of President Schwebel) ("There is an admitted failure by the Commonwealth of Virginia to have afforded Paraguay consular access, that is to say, there is an admitted breach of treaty.").

decision in favor of Paraguay, charging the United States with a very specific obligation while leaving it no alternative choice for its fulfillment. The obligation of the Unites States to suspend the execution was beyond any doubt.

4. *The Reasons for the "Double" Justification of the Legally Binding Character of Provisional Measures Orders*

One may find it unnecessary, illogical and superfluous to provide alternative grounds supporting the notion that provisional measures are legally binding. Nevertheless, the international character of the International Court of Justice, which enacts such orders and other judicial decisions, has to be considered. It was apparent from the beginning that orders would be sent to states with different legal and political systems. The court's jurisprudence and international legal theory tried not to close off different possible methods for the legal acceptance of its decisions. Unfortunately, the court's decisions are well known for lack of enforcement. If international lawyers and institutions step back every time there is the possibility of fortifying the system, there will be no chance for its development.

This article has argued that either ground could serve as a legal and legitimate basis to make provisional measures orders binding. Each option provides different opportunities for municipal courts to take international law seriously. If two alternatives are offered, it is less likely that municipal legal systems will refuse to give effect to I.C.J. orders, especially if interpretations are given by an authoritative institution.[58]

I will next examine whether these international legal grounds could have been used to give effect to the I.C.J. order in the U.S. legal system. I will also discuss U.S. legal doctrines and arguments that might have enabled the U.S. Supreme Court to recognize the I.C.J. decision in *Breard*.

---

58. The effect of I.C.J. decisions in national courts and their reception by them represent a vast and complex aspect of international law. *See generally* S. Ordonez & D. Reilly, *Effect of the Jurisprudence of the International Court of Justice on National Courts, in* INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 335-72 (T. M. Franck & G. H. Fox eds., 1996); Bedjaoui, *supra* note 44; B. CONFRONTI, INTERNATIONAL LAW AND THE ROLE OF DOMESTIC LEGAL SYSTEMS (1993); C.C. SCHREUER, DECISIONS OF INTERNATIONAL INSTITUTIONS BEFORE DOMESTIC COURTS (1980); L. ERADES, INTERACTION BETWEEN INTERNATIONAL AND MUNICIPAL LAW (1993).

B. The U.S. Law Perspective

The U.S. legal system has developed different mechanisms for receiving international law.[59] Although it corresponds to the requirements of international law, there are some features which are unique to the United States. However, one may find the rationale for this original approach to international law in the doctrine of dualism (well established in the U.S. legal system) and in the constant need to adhere to constitutional requirements in dealing with foreign affairs issues.

Dualism perceives international and national systems as separate and distinct legal orders that operate on different levels:

> Dualist doctrine points to the essential difference of international law and municipal law, consisting primarily in the fact that the two systems regulate different subject-matter. International law is a law between sovereign states; municipal law applies within a state and regulates the relations of its citizens with each other and with the executive.[60]

This concept tends to scrutinize international law by examining its internal validity.[61]

Domestic courts have a significant role in international law, which relies on domestic legal mechanisms to a great extent.[62] "The court thus employs the institutional authority conferred upon it by the local law to give effectiveness to the prescriptions of the international order, which lacks appropriate structures of its own for their enforcement."[63] Differences in legal structures may certainly cause problems, but authorities at both the international and domestic levels are aware of the inevitable application of international legal norms to domestic systems. The transparency of the two legal

---

59. *See* Bedjaoui, *supra* note 44, at 47-48 ("Reception can be viewed as a technique whereby the rampart of state sovereignty is breached, thus enabling the norm or the judicial decision to pass from the international legal order into the municipal legal order.").

60. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 33-34 (1979).

61. *See* HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 154 (1993) ("International law can be applied by municipal courts only when it has been 'transformed' or 'incorporated' into municipal law."). For discussion of the notion of internal validity, see C.C. SCHREUER, *supra* note 58, at 165.

62. *See* MARK JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 83 (1993) ("In fact, most times when international legal rules are applied by judges, the setting is a domestic, not an international, court.").

63. C.C. SCHREUER, *supra* note 58, at 166.

systems should be seen as a quality that does not necessarily frustrate the concept of dualism. Because globalization is one of the features of modern times, the courts' response to this policy is expected. U.S. courts acknowledge the importance of international law.[64]

The present problem may be seen as focused on international decisions, or only on the decisions of the World Court and how the U.S. courts respond to them. Although the U.S. Constitution provides that Congress has the power to outlaw violations of international law, it does not contain a general provision that deals directly with the reception of international decisions.[65] In the absence of such a provision, several possible solutions exist—to give no effect to international decisions; to treat them as foreign judgments; or to defer to other, more general, international law theories. The relationship between U.S. courts and the I.C.J. appears neither very strong nor legally prescribed.[66] Although U.S. courts have made some observations on I.C.J. decisions,[67] any deference to the I.C.J. found in them was more a matter of coincidence than obedience.[68] U.S. judges respected the I.C.J. decision that favored the United States in

64. *See* THOMAS M. FRANCK & MICHAEL J. GLENNON, FOREIGN RELATIONS AND NATIONAL SECURITY LAW 109 (2d ed., 1993) ("The law of nations is as deeply rooted in American jurisprudence as any other legal concept. . . . Despite this broad potential base on which to build, the U.S. courts have incorporated the law of nations quite sparingly, no doubt out of concern that the judiciary might otherwise become embroiled in foreign policy questions. Occasionally, however, the courts have applied the law of nations to do justice, particularly where there was no countermanding domestic black letter law.").

65. *See* C.C. SCHREUER, *supra* note 58, at 168.

66. *See* Ordonez & Reilly, *supra* note 58, at 344-45 ("The reception of I.C.J. decisions by domestic courts is a relatively new question that lacks an established analytical framework. The relationship between the I.C.J. and other courts and tribunals has few parallels. It is unlike the interaction of courts of first instance and appellate courts within a single legal system; relations between the supranational court of a regional treaty system, such as the European Court of Justice, and the domestic courts of the system's member states; or relations between courts of co-equal sovereign states. In many respects, the reception of I.C.J. decisions by domestic courts is a whole new category in itself.").

67. *See id.* at 353. I shall take into account the decisions that involved the United States, since although U.S. courts have also used other I.C.J. decisions, they have done so more to determine the substance of international legal norms than because of an international obligation. As far as the first question is concerned, two I.C.J. decisions are relevant: *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3 (May 24), and *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27).

68. Here I use the expression of Professor Harold H. Koh. *See* Harold H. Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 627-33 (1998).

Diplomatic and Consular Staff in Tehran, while the introduction of an I.C.J. decision unfavorable to the United States in *Committee of United States Citizens Living in Nicaragua* was met with domestic defenses precluding its application by the courts.[69]

U.S. courts have not established a formal connection that might assure the direct implementation of those decisions through a clear and firm obligation.[70] In *Breard*, the Supreme Court was aware of the provisional measures order's existence. Nevertheless, the Court only mentioned it without making any legal observations regarding its effect.[71] Because the Court did not provide it with any legal effect, the Court implicitly denied it all legal force. *Breard* implicitly suggested that the rulings of the I.C.J. are not binding in the United States.[72] Thus, formal arguments supporting the reception of international decisions in U.S. courts necessarily rely on indirect solutions, namely treaty obligations, general international law, and customary international law.[73]

1. Treaty Obligations

The court could have given effect to the I.C.J. Order in *Breard* by deferring to the U.N. Charter and the I.C.J. Statute. Both international conventions have the same effect as treaties in U.S. law because they were ratified by the President with the advice and consent of the U.S. Senate, as provided for by Article II of the Constitution. The treaty-making power is reserved to the federal government and allocated between the Senate and the President.[74] Article VI of the Constitution states that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."[75] The Supremacy Clause places treaties

69. *See* Ordonez & Reilly, *supra* note 58, at 359.

70. *See, e.g.*, Committee of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 935 (D.C. Cir. 1988) ("For purposes of the present lawsuit, the key question is not simply whether the United States has violated any of these three legal norms but whether such violations can be remedied by an American court or whether they can only be redressed on an international level.").

71. Breard, 118 S. Ct. at 1354.

72. *See Postscript*, 31 VAND. J. TRANSNAT'L L. 320, 323 (1998).

73. Such an approach is similar to the way in which international law arguments are presented in the previous chapter.

74. Executive agreements gain the protection of the Supremacy Clause as treaties. *See* George Slyz, *International Law in National Courts, in* INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 77-78 (T.M. Franck & G.H. Fox eds., 1996).

75. U.S. CONST. art. VI, cl. 2.

at the same level as federal laws, imposing treaty obligations on every state regardless of its own constitution and laws.

Nevertheless, the implementation of treaties into the U.S. legal system does not function as simply as the constitutional provision envisages. Several doctrines and rules govern the area of treaty implementation. Article 94 of the U.N. Charter, as well as corresponding provisions of the I.C.J. Statute, transfer adjudicatory authority to the U.N. and its organs, and the attribution of binding legal force to their decisions.[76] Seeing those conventions in this light, this perspective opens new questions for the U.S. courts. As Justice Sandra Day O'Connor has observed:

> There are many important substantive issues to be addressed by the courts in a judicial fashion. For instance, the vesting of certain adjudicatory authority in international tribunals presents a very significant constitutional question in my country. Article III of our Constitution reserves to federal courts the power to decide cases and controversies, and the U.S. Congress may not delegate to another tribunal "the essential attributes of judicial power" (*Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986)). Whether our Congress has done so with respect to tribunals created by different treaties and agreements is a critical question, but one that could only be answered in specific cases. . . . [W]hat effect international tribunals have on domestic courts may inform the analysis as to whether Congress acted constitutionally in creating the international panels and vesting them with substantive adjudicatory authority.[77]

American jurisprudence has shown considerable deference to international treaties, trying to adapt domestic considerations to the international obligations of the United States.[78] Still, one may find some examples to the contrary,[79] whether or not this inconsistency can

---

76. Even some executive agreements, by which the United States acceded to the NAFTA and WTO, are "binding under international law as treaties. They obligate the United States to comply with the decisions of multilateral entities (footnotes omitted)." Joel Paul, *Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CAL. L. REV. 671, 678-79 (1998).

77. Sandra Day O'Connor, *Federalism of Free Nations*, INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 19 (T. M. Frank & G. H. Fox eds., 1996).

78. Three famous cases illustrate the point: *The Charming Betsy* 6 U.S. 64, 2 L. Ed. 208 (1804), *Missouri v. Holland,* 252 U.S. 416 (1920), and *United States v. Palestine Liberation Organization*, 695 F. Supp. 1456 (S.D.N.Y 1988) [hereinafter *PLO*].

79. *See, e.g.*, United States v. Alvarez-Machain, 504 U.S. 655 (1992*);* Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993); Societe Nationale Industrielle

be seen as a dichotomy that is very often incorporated in legal concepts. Good faith interpretation of treaties actually refers to avoiding the frustration of a treaty in its construction and implementation. Although treaties have the same legal force as federal law, they are still not of the same character.[80] Arguably, the Court acted in bad faith in the *Breard* case by not applying other methods of treaty interpretation.[81]

As the doctrine of dualism tends to prove the internal validity of international law, mechanisms developed for that purpose are of an exclusively domestic character.[82] Can one say that the law of the land required compliance with the order of the I.C.J.?[83] Is it possible to say that Breard's execution has put the United States in violation of the U.N. Charter and the Statute of the I.C.J.?

Aerospatiale v. United States Dist. Court, 482 U.S. 522 (1987).

80. "These gentlemen would do well to reflect that a treaty is only another name for a bargain, and that it would be impossible to find a nation who would make any bargain with us which should be binding on them absolutely, but on us only so long and so far as we may think proper to be bound by it. They who make laws may, without doubt, amend or repeal them, and it will not be disputed that they who make treaties may alter or cancel them; but still let us not forget that treaties are made, not by only one of the contracting parties, but by both; and consequently that as the consent of both was essential to their formation at first, so must it ever afterward be to alter or cancel them." The Federalist No. 63 (John Jay).

81. *See* Jordan J. Paust, *Agora:* Breard, Breard *and Treaty-Based Rights Under the Consular Convention*, 92 AM. J. INT'L L. 691, 693 (1998). According to Paust,

> The per curiam opinion stated that international law requires "a clear and express statement to the contrary" or else "procedural rules of the forum state will govern implementation of" a treaty. This statement reflects several misunderstandings: (1) evident confusion of conflicts principles with international law; (2) a miserly misstatement of the law of treaties (especially the obligation to perform in good faith and the rule that internal law may not be invoked as justification for a failure to perform); (3) inattention to the role of customary law as interpretive background; and (4) inattention to the rule that treaties are to be construed liberally to protect express and implied rights.

Id. (footnotes omitted).

82. *See* James A. R. Nafziger & Edward M. Wise, *The Status in United States Law of Security Council Resolutions Under Chapter VII of the United Nations Charter*, 46 AM. J. COMP. L. 421, 422 (1998) ("Even though the UN Charter is the supreme law of the land, its domestic legal status within the United States is qualified by a number of other considerations.").

83. *See* Carlos Manuel Vazquez, *Agora:* Breard, Breard *and the Federal Power to Require Compliance with I.C.J. Orders of Provisional Measures*, 92 AM. J. INT'L L. 683, 685 (1998) ("By hypothesis, the law of the land required compliance with the Order and thus preempted the conflicting state order setting the execution date.").

a. Article 94 of the U.N. Charter

The application of Article 94 of the U.N. Charter was discussed before the U.S. courts only once, in *Committee of U.S. Citizens Living in Nicaragua v. Reagan.*[84] The D.C. Circuit refused to give effect to this article using domestic doctrines for treaty implementation that barred its application in this case.[85]

The court gave several reasons for such a holding. The appellants in the case, comprised of organizations and individuals who opposed United States policy in Central America, claimed to have suffered physical, economic and other injuries from the war in Nicaragua. Before this case was instituted in the U.S. courts, the I.C.J. had entered the judgment in the lawsuit instituted by Nicaragua against the United States that held that America's support of military actions by the so-called Contras against the government of Nicaragua violated both customary international law and a treaty between the United States and Nicaragua. The I.C.J. concluded that the United States "is under a duty immediately to cease and to refrain from all such acts as may constitute breaches of the foregoing legal obligations."[86]

The U.S. court stated that Article 94 of the U.N. Charter was not enforceable in U.S. courts as a treaty provision because this Article was not self-executing and it was preempted by subsequent Congressional action. The court tied its holding to the particular circumstances of the case:

> Congress has not clearly repudiated the requirement in Article 94 that every nation comply with an ICJ decision "in any case to which it is a party." U.N. Charter, art. 94. Rather, our government asserts that it never consented to ICJ jurisdiction in cases like the

84. 859 F.2d 929 (D.C. Cir. 1988).

85. It is useful to note one theoretical approach to this type of problem in domestic legal systems:

> Not surprisingly, the question of a possible collision between international obligations and precedents of the local courts has attracted attention primarily with respect to common law countries. Scholarly opinion is practically unanimous in the rejection of the principle of stare decisis for decision of domestic courts dealing with questions of international law. Jenks has suggested to solve this problem for English law by treating domestic decision on international law like judgments on a point of foreign law which are not subject to the doctrine of precedent.

SCHREUER, *supra* note 58, at 249.

86. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 4, 149 (June 27).

> Nicaragua dispute. Thus, Congress may well believe that its support for the Contras, while contravening the ICJ judgment, does not violate its treaty obligation under Article 94.[87]

The court therefore viewed Article 94 in relation to the particular act of Congress that regulated the financing of the Contras. The court interpreted Article 94 through the circumstances and substance of the I.C.J. judgment in this particular case, relying on the United States' acceptance of the I.C.J.'s jurisdiction for this special case. The interpretation of Article 94 came hand-in-hand with the interpretation of the particular judgment, which might mean that the applicability of this article depends on the substance of I.C.J. decisions and that Article 94 cannot be construed alone. The rule of *Committee of U.S. Citizens Living in Nicaragua* is that the Article 94 has to be interpreted together with the particular judgment and that it should not be taken as standing alone.

This was not the only ground for not accepting the legal effect of Article 94. The court also found that Article 94 of the U.N. Charter simply did not confer rights on private individuals.[88] In this analysis the court mainly relied on Article 94 as such, with less reference to the particular case, comparing this case with the previous grounds for the rejection of Article 94 as applicable in the U.S. courts. Still, some reference was made:

> Because only nations can be parties before the ICJ, appellants are not "parties" within the meaning of [Article 94, paragraph 2]. Clearly, this clause does not contemplate that *individuals having no relationship to the ICJ case* should enjoy a private right to enforce the ICJ's decision.[89]

The court's reading of international and U.S. law in reaching this holding thwarted individual attempts to have this judgment enforced, and the door stayed almost completely closed for future individual invocation of I.C.J. judgments in U.S. courts.[90] However, the court

---

87. *See* Committee of U.S. Citizens Living in Nicar., 859 F.2d at 936.

88. One previous decision imposed a more general prohibition in this respect, comparing it to the Nicaragua case. *See* Dickens v. Lewis, 750 F.2d 1251 (5th Cir. 1984) (individual plaintiffs did not have standing to raise claims under the United Nations Charter, the Universal Declaration of Human Rights, or the International Covenant on Civil and Political Rights).

89. Committee of U.S. Citizens Living in Nicar., 859 F.2d at 936 (emphasis added).

90. It is interesting to note that in *Diggs v. Shultz*, 470 F.2d 461 (D.C. Cir. 1972), "the court was invited to hold that mandatory sanctions applied by the UN Security

did not dispute the possibility of a situation where a state that is a party in a proceeding before the I.C.J. tries to use the I.C.J. decision as an argument before the U.S. courts. Also, the court stated that the I.C.J. was not intended to "vest citizens who reside in a U.N. member nation with authority to enforce an ICJ decision *against their own government.*"[91] Angel Breard was a Paraguayan citizen and sued the United States.

It seems that several elements of this case might be applied to *Breard.* The way that the court read Article 94 implies than not all future decisions of the I.C.J. will be without legal effect.[92] If the consent to I.C.J. jurisdiction is not disputed in a particular case, and if there is no subsequent act of Congress repudiating the specific prescription of the court's decision, then the I.C.J. decision might be viewed as binding under Article 94 of the U.N. Charter, subject to a valid connection between the particular I.C.J. case and an individual who is trying to invoke it.

In the *Breard* case, the U.S. Supreme Court did not discuss the I.C.J. order in this manner. Although the decision of the I.C.J. came into play, the Court did not even mention Article 94 of the U.N. Charter. It is useful to find parallels between *Committee of U.S. Citizens Living in Nicaragua* and *Breard.*

If one puts Article 94 of the U.N. Charter in conjunction with the circumstances of *Breard,* as the U.S. court did in *Committee of U.S. Citizens Living in Nicaragua,* one may find that this rule would have had different consequences. The jurisdiction of the I.C.J. was not disputed by the U.S. government,[93] nor had Congress acted in a way that might have prevented U.S. courts from taking into account the substance of the I.C.J. ruling. Congress stayed silent with respect to the execution of Breard. Furthermore, there is an act of Congress

---

Council under the UN Charter are self-executing treaty obligations which can be brandished by a US litigant. The court, in this instance, did not specifically deny this." FRANCK & GLENNON, *supra* note 64, at 362.

91. Committee of U.S. Citizens Living in Nicar., 859 F.2d at 938 (emphasis added).

92. The court did not interpret Article 94 of the U.N. Charter as standing alone, but in connection with the I.C.J. decision, thus indirectly showing that Article 94 cannot be judged before the courts alone and that the decisions must be taken into account as well.

93. Prima facie jurisdiction was found in Article 41 of the I.C.J. Statute. Jurisdiction for the merits was prescribed by the Optional Protocol appended to the Vienna Convention on Consular Relations and both the United States and Paraguay consented to this international agreement.

that might be said to support respect for U.S. obligations arising under the U.N. Charter—the United Nations Participation Act,[94] which "prescribes the domestic internal arrangements within our Government for giving effect to our participation in [the U.N.] and sets up machinery for complying with certain of the major international commitments which the United States assumed upon ratification of the Charter."[95]

As far as other conditions are concerned, it seems that the situation in *Breard*, compared to that in *Committee of U.S. Citizens Living in Nicaragua*, is different, although the rule of the latter can be applied so as to give effect to the I.C.J. decision in *Vienna Convention on Consular Relations, (Para. v. U.S.)*. Unlike in the I.C.J. decision regarding Nicaragua (which itself did not make any reference to any individual), the I.C.J. order in *Breard* was very precise and referred to Angel Francisco Breard.[96] The reference to a specific individual established a relevant connection between the I.C.J. case and the *Breard* case before the U.S. court.[97] Moreover, there was another actor seeking relief in the U.S. courts: Paraguay. Paraguay was a party before the World Court and the United States did not dispute the jurisdiction in that case.[98] *Committee of U.S. Citizens Living in Nicaragua* was connected to the I.C.J.'s decision in *Military and Paramilitary Activities in Nicaragua (Nicar. v. U.S.)*.[99] The United States contested jurisdiction in the preliminary phase of the I.C.J. by objections. After the I.C.J. confirmed its jurisdiction, the United States decided not to appear at the merits stage. The U.S. court found this contest of jurisdiction in the particular case relevant.[100]

---

94. 22 U.S.C. §§ 287(a)-(e) (1994).

95. 91 Cong. Rec. 12, 267 (1945) (statement of Sen. Bloom). *See also* Nafziger & Wise, *supra* note 82, at 425.

96. In *Breard*, the I.C.J. indicated "the following provisional measures: The United States should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order." 1998 I.C.J. 266 (Apr. 9).

97. *Cf.* Committee of U.S. Citizens Living in Nicar., 859 F.2d at 936.

98. Article I of the Optional Protocol to the Vienna Convention on Consular Relations, is the means by which the United States submitted to the compulsory jurisdiction of the I.C.J.

99. 1986 I.C.J. 14 (June 27).

100. Committee of U.S. Citizens Living in Nicar., 859 F.2d at 932 ("Prior to the I.C.J.'s decision, the United States withdrew from the merits phase of the court's proceedings, contending that the court lacked jurisdiction over Nicaragua's application."). *See also id.* at 936, 940 ("[O]ur government asserts that it never

However, the United States never disputed the jurisdiction of the I.C.J. in *Vienna Convention on Consular Relations (Para. v. U.S.)*.

It seems that one of the options in this case was to receive the I.C.J.'s ruling in accordance with the leading U.S. decision regarding the application of Article 94 of the U.N. Charter.[101] *Committee of U.S. Citizens Living in Nicaragua*[102] left open space that might have been construed so as to let the I.C.J. ruling come into play. The binding character of the order, as a matter of treaty law, might have found its way through the application of *Committee of U.S. Citizens Living in Nicaragua*. Furthermore, the Supreme Court has also emphasized that "the United States has a vital national interest in complying with international law."[103] Putting all these elements together, one may cite the opinion of Professor Henkin as a conclusion:

> My view that the Order was legally binding compels me to the conclusion that the United States was required, as a matter of international law, to take the provisional measures indicated by the Court. That international legal obligation derives from Article 41(1) of the Statute of the International Court, a treaty of the United States made by the President with the advice and consent of the U.S. Senate. Under international law, and under the U.S. Constitution, the Court's Order had the same character and status as a U.S. treaty obligation as does the Statute of the Court underlying the Order.[104]

---

consented to I.C.J. jurisdiction in cases like the Nicaragua dispute.").

101. There are some opinions to the contrary:

> Petitioners have relied on the United Nations Charter to argue that provisional measures are binding, but the language of the Charter does not support that conclusion. Article 94 (1) provides that "each member * * * undertakes to comply with the *decision* of the [I.C.J.] in any case to which it is a party." (emphasis added). "The decision," in the context of Article 94(1) of the Charter, evidently refers to the final decision of the International Court. Article 94(2) of the Charter elaborates that "if any party to a case fails to perform the obligations incumbent upon it by *a judgment* rendered by the [I.C.J.], the other party may have recourse to the Security Council." (emphasis added). Significantly, the Security Council has never acted to enforce provisional measures indicated by the I.C.J. . . .

Jonathan I. Charney & W. Michael Reisman, *Agora:* Breard, *The Facts*, 92 AM. J. INT'L L. 666, 672 (1998).

The non-exhaustion of procedural means before the Security Council does not mean that the international legal norm had not been activated before the procedural part. Article 94 does not influence its substantive character.

102. Committee of U.S. Citizens Living in Nicar. v. Reagan.

103. Boos v. Barry, 108 S. Ct. 1157, 1164 (1988).

104. Louis Henkin, *Agora:* Breard, *Provisional Measures, U.S. Treaty Obligations,*

However, it is difficult to shift from a horizontal to a vertical analysis and vice versa.[105] The majority opinion supports the non-self-executing character of the U.N. Charter as a whole, which would bar any separate examination of Article 94 and would prevent private parties from using I.C.J. decisions in U.S. courts.[106] I find this *a priori* approach to be mechanical, as I have tried finding a way for a more precise interpretation of the holding in *Committee of U.S. Citizens Living in Nicaragua.* The implementation and enforcement of international treaties can be considered as a province of the federal government and as a federal interest. Indeed, "the Supreme Court should have entered a stay to preserve the important federal interest in ensuring compliance with the measures."[107] The introduction of the I.C.J. decision through the I.C.J. Statute and Article 94 of the U.N. Charter appears to be complex. Since both of these documents are treaties, I shall try to address each obstacle that prevents implementation of the World Court's decision in the U.S. courts.

b. The Doctrine of Self-Executing Treaties

One of the hurdles to determining whether a treaty obligation is binding is the doctrine of self-executing treaties.[108] This doctrine presupposes a certain legal character of a treaty in order to have it applied in the courts. A treaty is self-executing if no additional legislative action is required for its application in the courts.[109] There is a distinction among treaties regarding the branch of the federal government that is addressed by them. If a treaty addresses a political branch, the treaty lacks a self-executing character.[110] The next question is whether a treaty that addresses the judicial branch

---

and the States, 92 AM. J. INT'L L. 679, 680 (1998).

105. *See generally* Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L.J. 2277 (1991).

106. *See* Ordonez & Reilly, *supra* note 58, at 356.

107. Lori Fisler Damrosch, *Agora:* Breard, *The Justiciability of Paraguay's Claim of Treaty Violation*, 92 AM. J. INT'L L. 697, 702 (1998).

108. "Despite good arguments in favor of a presumption that treaties generally should be regarded as self-executing, recent practice may run in the opposite direction by presuming that international agreements are not self-executing." Nafziger & Wise, *supra* note 82, at 424 (1998).

109. *See generally* Slyz, *supra* note 74 ("The centrality of the idea of 'self-executing treaties' to American foreign relations law is remarkable, given that Article VI of the Constitution does not distinguish between self-executing and non-self-executing treaties.").

110. *See* Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L. L 695, 695-96 (1995) (citing authorities).

confers any private rights upon individuals.

It seems difficult to give precise predictions about the character of a treaty at the moment of its ratification; the solution of this problem seems to be reserved for the implementation procedure,[111] and the courts are the ones to make the appropriate qualifications.[112] The Ninth Circuit has described this process as follows:

> The extent to which an international agreement establishes affirmative and judicially enforceable obligations without implementing legislation must be determined in each case by reference to many contextual factors: the purposes of the treaty and the objectives of its creators, the existence of domestic procedures and institutions appropriate for direct implementation, the availability and feasibility of alternative enforcement methods, and the immediate and long-range social consequences of self- or non-self-execution.[113]

However, it seems that the courts rely upon the intent expressed in a treaty to a great extent.[114] The consequence of a "negative diagnosis" is the non-enforcement of the treaty in the U.S. courts; in other words, remedies for a treaty violation cannot be found in the province of the courts of the United States.

One of the problems is how to analyze the treaty—as a whole or as a group of provisions where each provision can be treated as having independent legal status. Is it possible to disjoin a treaty into self-executing and non-self-executing provisions? The answer is affirmative.[115] "It is well accepted that some provisions of a treaty may be self-executing while others are not."[116] It has been pointed out several times that the U.N. Charter has a non-self-executing

---

111. "But when express or implied congressional powers are not so clear, the line between 'self-executing' and 'non-self-executing' treaties is controversial." Nafziger & Wise, *supra* note 82.

112. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 154 (1965) ("Whether an international agreement of the United States is self-executing is a matter of interpretation to be determined by the courts.").

113. People of Saipan v. United States Dep't of the Interior, 502 F.2d 90, 97 (9th Cir. 1974).

114. *See* Franck & Glennon, *supra* note 64, at 342, 348.

115. *See id.* at 342 ("It should be noted, however, that even in the U.S., treaties do not automatically become the equivalent of statutory law in the sense of being enforceable in courts by the 'beneficiaries' of its provisions . *Some do, or some parts may* . . . .") (emphasis added).

116. Vazquez, *supra* note 110, at 709 (footnote omitted).

character.[117] However, it is possible to extract certain provision of the Charter and analyze them differently.[118]

The issue of the effects of international decisions, examined in the light of this doctrine, focuses the *Breard* case on two important issues: the question of the intended addressee of the I.C.J. order, and the interpretation of Article 94 of the U.N. Charter. If the order is seen as directed to the political branches of the United States, as I think that it was in this case, the U.S. courts may treat it as binding, regardless of whether a treaty confers private rights upon individuals, which remains an open question. It is interesting to point out that the application of the Vienna Convention on Consular Relations, which was the cause of the proceeding before the World Court, was not barred by its non-self-executing character in any respect; the last-in-time doctrine actually deprived Breard of the ability to raise this question in federal courts. It seems that the Vienna Convention has a self-executing character with respect to recognized private rights, and the Fourth Circuit recognized that it provided individual rights to Breard.[119] Moreover, the U.S. government acknowledged that the Vienna Convention was self-executing.[120] However, the Supreme Court noted that the Vienna Convention does not confer upon a petitioner a private right of action to set aside a criminal conviction and sentence for violation of consular notification provisions because neither the text nor the history of the Vienna Convention expressly provide such a private right of action.[121] I find this interpretation

117. *See, e.g.*, Nafziger & Wise, *supra* note 82, at 424 ("Courts in the United States have generally held that the United Nations Charter is not self-executing. The question has come up most notably in efforts to invoke the human rights clauses of the Charter in domestic litigation.").

118. This was done in the *Committee of U.S. Citizens Living in Nicaragua* with respect to Article 94, and in *People of Saipan* regarding Article 79 when the article was not proclaimed as non-self-executing.

119. Breard v. Pruett, 134 F.3d 615, 619 (4th Cir. 1998). Also, in *Faulder v. Johnson*, 81 F.3d 515 (5th Cir. 1996), the court held that an arrestee's rights under the Vienna Convention were violated when Texas officials failed to inform the arrestee of his right to contact the Canadian Consulate. Similarly, in *United States v. Lombera*, 170 F.3d at 1243, the court stated, "Because Article 36(1)(b) [of the Vienna Convention on Consular Relations] establishes individual rights, these rights must be enforced by our courts."

120. *See* Lori Fisler Damrosch, *supra* note 107, at 698.

121. *Breard* was invoked in a similar proceeding that happened only a month afterwards when a district court found that the Bilateral Convention between Mexico and the United Stated provides such a private right of action. Consulate General of Mex. v. Phillips, 17 F. Supp. 2d 1318 (S.D. Fla. 1998).

misplaced, as this is not the only focus of the remedying aspect of the Vienna Convention, nor is it something to which the I.C.J. order referred. Here one can see how two procedures directed to the same issue collided again: treaty implementation procedures and the acceptance of an international decision were barred by the same domestic arguments. Although I do not want to discuss fully the implementation of the Vienna Convention in this case, it can be indicated that even if those procedures were seen as acting in concert, the doctrine of self-executing treaties prevented them, in one way or another, from giving effect to the international legal norm. In *Breard*, purely domestic arguments of a procedural character were given full effect, whereas some domestic arguments of an international character, such as the *Charming Betsy* rule,[122] were ignored.[123]

One may go back to the *Committee of U.S. Citizens Living in Nicaragua* and its interpretation of Article 94. The court in that case did not discuss the question of the addressee, since it was more concerned about the private rights of individuals under both an international treaty and the particular judgment in question. As has been noted, the *Committee of U.S. Citizens Living in Nicaragua* test might have been applied to *Breard* successfully with respect to the question of the private rights of individuals as connected with a particular judgment. But even if the U.S. Supreme Court had reached this conclusion, it would not have necessarily meant that the self-executing dilemma was completely solved, due to the problem raised by the question respecting the addressee of the I.C.J. order.[124] The U.S. Supreme Court might have found it to be one addressed to the political branches of the government and, thus, leave the I.C.J. order without legal effect.[125] The order would certainly have been

122. Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64, 117 (1804) ("It has also been observed that an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains. . . . These principles are believed to be correct, and they ought to be kept in view in construing the act now under consideration.").

123. *See* Paust, *supra* note 81 at 692.

124. *See* Vazquez, *supra* note 110, at 722-23 ("[A] treaty might be judicially unenforceable because the obligation it imposes is of a type that, under our system of separated powers, cannot be enforced directly by the courts. This branch of the doctrine calls for a judgment concerning the allocation of treaty-enforcement power as between the courts and the legislature.").

125. It is worth noting here the existence of the U.N. Participation Act, 22 U.S.C. § 287 (1994), which "prescribes the domestic internal arrangements within our Government for giving effect to our participation in the United Nations and sets up machinery for complying with certain of the major international commitments which

judicially unenforceable for reasons other than the question of private rights of action, due to the separation of powers doctrine and the fact that it was addressed to the political branches. The questions relating to the implementing legislation, addressees, and the existence of private rights are part of the concept of self-executing treaties.[126] This is especially pertinent because of the character of the I.C.J.'s orders as opposed to its judgments.

This complex and profound doctrine puts forward arguments that raised insurmountable obstacles to this order's acceptance on a treaty-based ground. On the other hand, the U.S. courts declared that Article 36 of the Vienna Convention confers private rights upon individuals and therefore is a self-executing provision. If the order itself was not a sufficient reason to comply with the international obligations, there was still the Vienna Convention as a device to justify compliance.

c. *The Last-in-Time Rule and the Positions of Congress and the Executive*

As mentioned above, the self-executing doctrine did not prevent the U.S. court from complying with international obligations. The biggest hurdle was the last-in-time rule, which outweighed the benefits and advantages of both the self-executing doctrine and the Vienna Convention. The last-in-time doctrine applies in cases when treaties and federal statutes conflict. The U.S. courts first seek to reconcile their conflicting provisions. "If no such reconciliation is possible, then the rule is that the treaty or federal statutory law later in time controls."[127]

Under the Constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both if that can be done without violating

---

the United States assumed upon ratification of the Charter." 91 Cong. Rec. 12, 267 (1945) (statement of Sen. Bloom).

126. *See* Stefan Riesenfeld, *The Doctrine of Self-Executing Treaties and* U.S. v. Postal*: Win at Any Price?,* 74 AM. J. INT'L. L. 892, 896-97 (1980). The question whether private individual rights fall under the self-executing doctrine is unclear. At any rate, the final consequence is treaty uninvocability. *See generally* Vazquez, *supra* note 110.

127. MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 89 (1993).

the language of either. But if the two are inconsistent, the one last in date will control the other, provided that the treaty on the subject is self-executing.[128]

The last-in-time rule is also a product exclusively of American jurisprudence and its interpretation of the Supremacy Clause. This doctrine was established by *Cherokee Tobacco*, 78 U.S. (11 Wall.) 616 (1870), and *Head Moneys Cases*, 112 U.S. 580 (1884).[129] The treaties and federal law are placed on the same footing, and both legal sources are construed by the Supreme Court as equal expressions of congressional will. Therefore, if two legislatures' wordings conflict, that later in time prevails—*lex posterior derogat legi priori.* This rule should be interpreted through the jurisprudence. One finds *Charming Betsy*, *PLO* and other cases as leading examples of the deference to the international legal order when this rule is applied. *Charming Betsy* ruled that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[130] In *PLO*, the Court held that the Headquarters Agreement was a valid treaty and not superseded by the Anti-Terrorism Act (ATA) because the ATA did not require closure of the PLO Permanent Observer Mission:

> The Permanent Observer Mission to the United Nations is nowhere mentioned in haec verba in this act, as we have already observed. It is nevertheless contended by the United States that the foregoing provision requires the closing of the Mission, and this in spite of possibly inconsistent international obligations. According to the government, the act is so clear that this possibility is nonexistent.[131]

In the *Breard*, the courts found that the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254(e)(2) (effective April 24, 1996), derogated the enforcement of Article 36 of the Vienna Convention in federal courts. On the other side, the last-in-time doctrine was not an impediment for the I.C.J. order as related to Article 94 of the Charter and the I.C.J. Statute.

---

128. *See* Whitney v. Robertson, 124 U.S. 190, 194 (1888).

129. According to *Head Moneys Cases*, "A treaty . . . is a law of the land as an act of congress is . . . . But even in this aspect of the case there is nothing in this law which makes it irrepealable or unchangeable. The constitution gives it no superiority over an act of congress in this respect, which may be repealed or modified by an act of a later date." *Id.* at 599. Other relevant cases include *Whitney v. Robertson*, 124 U.S. 190 (1888), and *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

130. Charming Betsy, 6 U.S. at 118.

131. 695 F. Supp. at 1469.

The I.C.J. order as a treaty obligation did not have obstacles in the last-in-time doctrine, taking into account the *Committee of U.S. Citizens Living in Nicaragua.* This approach relies upon the starting premise that the I.C.J. order is a treaty obligation. In *Committee of U.S. Citizens Living in Nicaragua*, the court found the act of Congress for financing the Contras to have repudiated the substance of the I.C.J. judgment. In *Breard*, Congress stayed silent with respect to the I.C.J.'s ruling and the Vienna Convention on Consular Relations.

The U.S. federal courts held in this case that a claim based on the violation of the Vienna Convention on Consular Relations cannot be raised in federal court if the party has failed to raise such a claim in state court. The party has procedurally defaulted under the Antiterrorism and Effective Death Penalty Act. Before this act came into force on April 24, 1996, this procedural requirement did not exist. The courts found that AEDPA superseded Article 36 of the Vienna Convention. The supporting argument was that the rules of the forum state govern the procedure of treaty application in domestic courts. This rule exists in international law, but subject to certain restrictions.

As mentioned above, *Charming Betsy* and *PLO* are strong international law arguments of domestic origin regarding the last-in-time rule. While the *Charming Betsy* rule refers to the interpretation of international law in all respects, *PLO* is principally focused on this doctrine, limiting its scope to the condition of the explicit intent expressed in the statute tending to supersede the treaty.[132] The holding of *PLO* states that not every act can supersede a treaty, but only those that are clear about the derogation of a specific treaty. The last-in-time rule itself shows provincialism, while the courts' willingness to construe domestic law consistent with international law demonstrates internationalism.

The holding of *PLO* is applicable to *Breard* regarding the way the court interpreted an act that tends to supersede a treaty. As the *Breard* court found, the rules of the Anti-Terrorism and Effective Death Penalty Act of 1996 had overruled Article 36 of the Vienna Convention on Consular Relations. However, there was no attempt at reconciling those two rules.[133] Breard was not involved in terrorist

132. *See id.*

133. *See* Detev F. Vagts, *Taking Treaties Less Seriously*, 92 AM. J. INT'L L. 458, 459 (1998); *see also* Cook v. United States, 288 U.S. 102, 53 S. Ct. 305, 77 L. Ed. 641 (1933) (stating that the Court would apply this rule only where Congress was clear in

activities, so the application of the act with respect to its superseding the Vienna Convention is questionable,[134] especially taking into account the *PLO* decision where an even more applicable statute did not trump the treaty due to the lack of explicit will in that respect. Comparing *Breard* and *PLO*, it seems that an interpretation in good faith of the domestic legal rules was deficient. The *PLO* court was looking at the history of the Anti-Terrorism Act and analyzed its language trying to establish the clear intent of the legislature to revoke a specific obligation.[135] If the complete analogy were applied to *Breard*, it would mean that the court should reconcile the Anti-Terrorism and Effective Death Penalty Act with the Vienna Convention.

Moreover, the proceeding before the state courts started in 1992, when the violation actually happened and while the Antiterrorism and Effective Death Penalty Act had not yet been enacted. The problem of ex post facto laws may be the impediment in this case so as to prevent a person from having the appropriate remedy for a violation.

The last-in-time rule as such and as applied in this case shows not only that the procedural rules of the forum state apply in dealing with international prescriptions, but also that the non-implementation of this international decision lies solely on procedural grounds. This aspect shows deeper roots of the doctrine as well as its policy reasons:

> An examination of these forms of international review is handicapped by the fact that the grounds given by a court for the non-application of an international decision need not represent its true motives. Thus, a refusal to implement an international decision based on procedural grounds can have its true reasons in the disapproval of its material contents. The withdrawal into procedural niceties is often the only possibility to resist a disagreeable decision and to avoid its consequences. On the other hand, the endeavor to eliminate the international decision as quickly as possible from the proceedings can also result from an

---

expressing its will for the abrogation of a treaty and that the Court will not infer this easily but will tend to reconcile the conflicting enactments).

134. *See* Curtis A. Bradley & Jack L. Goldsmith, *The Abiding Relevance of Federalism to U.S. Foreign Relations*, 92 Am. J. Int'l. L. 675, 678 (1998).

135. 695 F. Supp. at 1468 ("First, neither the Mission nor the Headquarters Agreement is mentioned in the ATA itself. Such an inclusion would have left no doubt as to Congress' intent on a matter which had been raised repeatedly with respect to this act, and its absence here reflects equivocation and avoidance, leaving the court without clear interpretative guidance in the language of the act.").

insecurity and aversion on the part of the judge due to the international character of the decision involved.[136]

d. Justiciability

Another possible approach to this case is through the doctrine of political questions. As politics, or more precisely foreign affairs, "are different from all other matters of state in some crucial fashion,"[137] they deserve other treatment, and the "conduct of foreign affairs by the political agencies should be immune to judicial scrutiny."[138] The respect of the courts of the United States for the separation of powers and the need to keep balance among all branches of the federal government are accommodated through this doctrine. "Indeed, to say that a law raises political questions is to say that its enforcement has been allocated to a branch other than the judiciary, and in this case that branch would clearly be the Executive."[139]

International law and international relations are closely connected and intertwined. The rise of every international norm is caused and accomplished by political efforts in the international arena. The problem arises when exclusively interstate relations try to penetrate into domestic legal systems due to the object of their regulation. This aspect emerges every time an individual is protected by or given some right under an international instrument. The instrument represents the consent of two governments. Treaties are necessarily political, but the legal character of the instruments in question still can be preserved.

U.S. courts have refused to deal with the questions of "recognition, territorial sovereignty, and international legality of hostilities. Such 'nonjusticiable' disputes involve relations between states."[140] The problem lies in the judicial qualification of political questions, which largely depends on the circumstances of a particular case and the estimation by the court as to how far the discretionary power of the executive is endangered.[141] The consequence of the

136. *See* Schreuer, *supra* note 58, at 29.

137. T. M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS 3 (1992).

138. *Id.*

139. Vazquez, *supra* note 83, at 685-86.

140. Brilmayer, *supra* note 105, at 2300.

141. *See, e.g.*, Committee of U.S. Citizens Living in Nicar., 859 F.2d at 932 ("The district court dismissed appellants' entire complaint on the ground that it involved nonjusticiable political questions. We believe the trial court's reliance on the political question doctrine was misplaced, particularly to the extent that appellants seek to

nonjusticiability determination is a refusal by the court to give a legal remedy for the alleged violation. It seems that courts deem international decisions as nonjusticiable quite often.[142]

In *Breard*, both writs of certiorari were denied, which may indicate the reluctance of the judiciary to deal with the matter as a political question. U.S. arguments before the courts, as well as the manner in which the Supreme Court dealt with this matter, amounted to the effect of a nonjusticiability determination.[143]

Even some arguments of the U.S. Government and some examples from previous judicial practice seem to undercut the U.S. position. "[T]he U.S. government [has] noted the availability of adjudication on the international plane, under the Vienna Convention's Optional Protocol to which both the United States and Paraguay are parties."[144] This approach may persuade the courts to not give a remedy to Paraguay for a treaty violation. On the other hand, this can provide the courts with one more reason to give effect to the I.C.J. order, since this statement reflects U.S. foreign policy goals. Not giving effect to the order would amount to unreasonable interference with U.S. foreign policy. One of the reasons why the I.C.J. order came into play in the first place was the judgment of the I.C.J. that the justiciability question was not resolved properly before domestic courts. If the violation of the treaty had been remedied in

---

vindicate personal rights rather than to conform America's foreign policy to international legal norms.").

142. *See* SCHREUER, *supra* note 58, at 31.

143. According to Lori Fisler Damrosch,

> At one or another phase of these proceedings, the U.S. Government pressed a variety of arguments that (if accepted) would rule out virtually any judicial consideration of a treaty-based claim. The haste with which the Supreme Court denied a stay in Breard's case foreclosed adequate consideration of the justiciability of such claims in domestic courts and also effectively barred Paraguay from achieving the relief it sought on the international plane. . . . Against adjudication in federal courts, the U.S. Government argued expansively that "treaty disputes between governments are not justiciable in domestic courts." This general heading subsumed several different points, including that a foreign state could not bring suit in U.S. courts on any treaty claim, that a consular officer is not a "person" for purposes of suing to enforce treaty rights under federal law, that the Vienna Convention on Consular Relations itself contemplates no judicial remedies of the sort demanded, and that the case presented a "political question" that could be addressed only through diplomatic channels rather than the courts.

Damrosch, *supra* note 107, at 697-98 (footnotes omitted).

144. *Id.* at 698 (citing Brief for the United States as Amicus Curiae, at 11-27, Republic of Paraguay v. Allen, 134 F.3d 622 (4th Cir. 1998)).

the U.S. courts, Paraguay would not have had a cause of action before the I.C.J., nor the prima facie case necessary for a provisional measures procedure.

As only one previous example shows, the court's willingness to solve the case substantively may outweigh the procedure before the World Court. After *Societe International pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958) was instituted, *Interhandel (Switz. v. U.S.)*[145] before the I.C.J. was terminated.

Breard certainly has both horizontal and vertical aspects.[146] It involved another state, an international treaty, an international court decision, and a pending proceeding before the World Court. On the other hand, there was an individual claiming private rights under the international convention, trying to connect himself with the international decision.[147] Balancing between these two aspects, the court chose to protect the state interest, as it was indirectly implicated by the behavior of the executive in this case.[148] But was this the right way to pursue this goal? If the court wanted to shift the issue to the executive, as it apparently did, non-recognition of the I.C.J. order, making a justiciable issue non-justiciable, was not the best way to do it.[149] The U.S. government could have helped the courts to deal with the case in a more legal manner, as there was the possibility to

145. 1957 I.C.J. 105 (Oct. 24); 1959 I.C.J. 6 (Preliminary Objections).

146. *See* Brilmayer, *supra* note 105, at 2300.

147. So called mixed cases are not rare before the International Court of Justice. They appear in international law as connected with diplomatic protection when it is undertaken due to the violation of an international treaty that protects individuals. There are two possible violations (and causes of action): those with respect to an individual and those with respect to a state party. These two causes are often blurred, especially when dealing with the exhaustion of local remedies (states parties are not bound by this condition). A good example is the ELSI case, where the U.S. claimed a violation of the Treaty on Friendship, Navigation and Commerce with respect to both the U.S. as a state and two American firms which it took into diplomatic protection before the I.C.J. Case Concerning Elettronica Sicula S.P.A. (ELSI), (U.S. v. Italy), 1989 I.C.J. 15.

148. This issue is analyzed *infra* Part II.

149. *See* Damrosch, *supra* note 107, at 704. According to Damrosch,

> When Paraguay's efforts to obtain relief from the U.S. judiciary encountered opposition from the executive branch on the ground (inter alia) that the proper avenues for relief were diplomatic channels or international litigation, Paraguay's initiation of the I.C.J. proceeding on the eve of Breard's execution deserved a response from the United States that would have enabled these serious issues to receive a full airing (where the U.S. position might well have ultimately prevailed).

separate things and still leave some space for the State Department to entertain the political aspects of the case through diplomatic negotiations. "If the U.S. Government had suggested this approach, the dual litigation might have proceeded toward a resolution that would have left both sides, and both courts—as well as the world community—satisfied that the rule of law had been honored."[150] The case does not necessarily have to be non-justiciable just because both the state interest and private rights under international treaty are at stake.[151] This amounts to a balancing test between these aspects and makes the choice more difficult, influenced by a presupposition "that international relations are properly handled by the Executive and Legislative branches of government."[152] The courts, however, may perceive the position of the United States on the international plane and still preserve the justiciability of the issue; indeed, "where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations."[153] Here, the court viewed the United States as a civilized nation with all the consequences attributed to that fact by international law. Nevertheless, the application of international law in U.S. courts is close to the justiciability question. The proceeding before the World Court, if the case had not been discontinued, would have certainly led to the combined questions of direct and indirect state responsibility as connected with the horizontal and vertical aspects of the case.

As noted, international decisions tend to be treated as a non-justiciable matter for U.S. courts. Although an exception regarding international arbitral tribunals has been created, all other decisions are very often classified as a matter of foreign affairs.[154] This tendency may be changed if more legal elements enter the international law environment in the U.S. courts that would encourage them to refer to noncommercial decisions as justiciable issues.[155] As the Supreme

150. *Id.*

151. *See* Brilmayer, *supra* note 105, at 2300.

152. Slyz, *supra* note 74, at 103-04.

153. The Paquete Habana, 175 U.S. 677, 700 (1903).

154. *See* Franck & Fox, *Transnational Judicial Synergy*, *in* INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 10-11.

155. *See* Ordonez & Reilly, *supra* note 58, at 356. According to Ordonez and Reilly,

> It is encouraging that the court rejected a blanket invocation of the doctrine in this case, since actions involving international law are often dismissed for this reason in U.S. courts. Instead the court found that application of the

Court noted in *Baker v. Carr*, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[156] If domestic courts are seen as "agents of a developing international legal order, as well as servants of various national interests,"[157] helping to transcend the shortcomings of international institutions, then they should act not to enlarge obstacles and hurdles, but to fight against them vigorously. This did not happen here.

2. *General International Law Obligations and Customary International Law Arguments*

Beyond those grounds discussed above, there are other grounds in international law that could be invoked for giving effect to the I.C.J. order in *Breard*. Apart from treaty obligations, general international law offers two other grounds: customary international law and *jus cogens*. Unlike customary international law, which has been recognized as an independent ground in both U.S. law and international law, *jus cogens* still has not been developed fully, mostly due to the lack of effective and appropriate procedures on the international plane. The concept of *jus cogens* exists, however, more as a substantive argument and does not have well-established roots in American jurisprudence. Therefore, it is more accurate and effective to analyze this basis in connection with some other issues connected to it, such as the protection of human rights.[158]

Customary international law arguments include formal elements which elucidate rather than solve the problem. Customary international law does not possess the same strength and position as treaties. One famous case in this respect is *The Paquete Habana*, which established the rule:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction....

---

doctrine should not be contingent on the nature of the party raising the issue or its interests, but rather on whether the claim is genuinely inappropriate for judicial review because it raises policy questions clearly within the authority of a political branch of the government.

Id. (footnotes omitted).

156. 369 U.S. 186, 211 (1962).

157. RICHARD A. FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER 65 (1964).

158. The *jus cogens* concept, including its procedural and substantive aspects in international and U.S. law, transparency in the international legal order with respect to *jus cogens* arguments, an analysis of the vertical and horizontal structure of the international plane, and the application of this concept, are discussed in Part III *infra*.

> For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.[159]

Before international custom can be applied, there are certain other sources of law that come first—the Constitution, federal statutes, and treaties, which are a sort of higher law placed on a higher footing:

> Whatever force appellant's argument might have in a situation where there is no applicable treaty, statute, or constitutional provision, it has long been settled in the United States that the federal courts are bound to recognize any one of these three sources of law as superior to canons of international law.[160]

Customary international law cannot trump any of these sources. It is viewed, rather, as a part of federal common law.[161] In light of *Fernandez-Roque v. Smith,*[162] it seems that the President has the authority to ignore customary international obligations since he "need do no more than take official action through his subordinates to negate the domestic effect of otherwise applicable customary norms."[163] These aspects demonstrate the weakness of a customary international legal argument in general, especially in this case. It may come into play if there is a gap in U.S. law that international custom could fill. The legal problems in this case arose, however, from the conflicting interpretations, not from the lack of instruments governing this area. There was no place for customary international law, and even if there was, the rationale of *Committee of U.S. Citizens Living in Nicaragua* would easily outweigh the possibility of giving effect to an international decision on the basis of customary international law.[164]

---

159. 175 U.S. 677, 700 (1900).

160. Tag v. Rogers, 267 F.2d 664 (D.C. Cir. 1959).

161. FRANCK & GLENNON, *supra* note 64, at 109 ("The courts' tendency to speak of international customary law as implicitly incorporated into common law can be traced back to pre-revolutionary English and to eighteenth century American cases.").

162. 622 F. Supp. 887 (D. Ga. 1985).

163. Slyz, *supra* note 74, at 96.

164. Customary international law still has some connections with international decisions, but only indirectly. It seems that U.N. resolutions and decisions are used as authoritative sources of customary international law. *See* Gregory J. Kerwin, Note, *The Role of United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts*, 1983 DUKE L.J. 876, 886 (1983).

II. Constitutional Arguments: Foreign Affairs Matters and Structural Limitations

The previous part of this article tried to explain how the I.C.J. and U.S. courts interpret the legality of international decisions and the validity of provisional measures orders. The U.S. courts' approach to this problem is very important, as they are in a position to give effect to international norms. The previous part demonstrated how the U.S. courts could have used different doctrines on the implementation of international law into the domestic legal system in order to give effect to the I.C.J.'s request and postpone the execution of Angel Breard. While the preceding part focuses on the position and actions of the U.S. courts only, this part will try to elucidate the position of another branch of the federal government—the executive. The reason for this approach is that the U.S. legal and political system favors the executive branch in the realm of foreign affairs, where the President has powers to the exclusion of the two other branches of the federal government. The executive could have used certain constitutional arguments in order to ensure compliance with the I.C.J.'s order. Another issue concerning the U.S. domestic legal system is the supremacy of the federal government over states in the domain of foreign affairs.

The legal issues in *Breard* activated constitutional arguments and mechanisms. These issues involved the U.S. and Paraguay, the I.C.J. and its mechanisms, diplomatic and consular relations and instruments, the position of aliens and the matter of consular protection, pending proceedings before two courts, and the possible indirect involvement of other state members of the U.N. and the Vienna Convention. The problem became complex and urgent and culminated in the I.C.J. order, demanding a quick, yet legally viable solution. Furthermore, the reputation and possible embarrassment of the U.S., potential detrimental effects on other consular relations, and implications for the protection of U.S. citizens abroad, were at stake. However, the order itself urged the U.S. to take all necessary measures to stay the execution. This question involved foreign affairs demanding immediate action for solving complex international relations issues. When international issues reach the state, the organs in charge of foreign affairs are expected to deal with them.[165]

165. This presumption is followed in the U.N. Vienna Convention on the Law of Treaties, July 1969, art. 7, 8I.L.M. 679: "In virtue of their functions and without having to produce full powers, the following are considered as representing their

The order was actually addressed to the U.S. government.[166] What could the executive branch have done in this case in light of the foreign affairs implications? The U.S. defense amounted to an inability to act due to domestic constitutional restraints,[167] offering an apology as a remedy, as well as a pledge to ensure future compliance with the Vienna Convention.[168] The U.S. was restrained by federal constitutional impediments from complying with international legal prescriptions. Separation of powers and federalism were constitutional restraints that arguably prevented the executive branch from taking action. Seemingly, some of those restraints could have been avoided, and U.S. domestic law could have given way to international law.

A. The Executive and Judicial Branches: Separation of Powers

Before the I.C.J., the United States invoked the separation of powers as an impediment to act in accordance with the order. The U.S. argued that the solution of the whole matter depended solely on the judiciary and that any interference was not permitted. The validity of such an argument before the I.C.J. is a separate issue. Here, I intend to dispute this argument, as there are several examples proving the ability and legality of the executive to step in when foreign issues are at stake.

If a matter of foreign affairs appears before the U.S. courts, they are very likely to defer to the executive branch, leaving non-justiciable questions to the autonomy of political branches. Such deference is more readily granted if the political branches themselves seek this kind of assistance.[169]

State: (a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty . . . ."

166. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) ("[T]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.").

167. *See* Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), para. 19 ("[The] Government of the United States had emphasized *inter alia* that a stay of execution depended exclusively on the United States Supreme Court and the Governor of Virginia."); *see also* Louis Henkin, *Agora*: Breard, *Provisional Measures, U.S. Treaty Obligations, and the States*, 92 AM. J. INT'L. L. 679, 680 (1998) ("The Court's Order is addressed to the 'United States.'").

168. Case Concerning the Vienna Convention on Consular Relations, (Para. v. U.S.), para. 29.

169. *See* Franck & Fox, *supra* note 154, at 16 ("Our deference to the primary authority of the political branches, of course, yields most readily when the political branches themselves seek our assistance and invoke the judicial power in the course

According to O'Connor,

> Domestic courts may show deference to the Executive by enacting legislation creating or consenting to the creation of such tribunals. The political branches in our country have obviously judged that they further America's foreign interests. To the extent that these new tribunals necessitate the involvement of the federal judiciary, Congress and the President are in effect seeking judicial involvement in these matters. Further deference is paid to the Executive by negotiating and approving treaties and agreements that create transnational tribunals and prescribe relationships with our domestic courts. The political branches of our government are asking the judiciary to refuse to abstain from its usual adjudicatory function.[170]

Moreover, the executive could have treated the *Breard* problem as a question of the highest importance, but instead, as was stated before the World Court, it deferred to the judicial branch. The Supreme Court did not seem to share in this opinion, as it was awaiting the answer of the Solicitor General, who responded that the I.C.J. order was not binding under international law.[171] There are several implications arising from this statement. First, this departs from the international legal rule. Second, the letter could have explained to the Supreme Court the importance of the case before the I.C.J. and the need to comply with international treaty obligations, which would have signaled to the Supreme Court how foreign affairs are implicated. The information of the Solicitor General is usually given great deference in cases involving foreign affairs.[172] Third, any benefit

---

of conducting foreign affairs.").

170. O'Connor, *supra* note 77, at 17.

171. *See* Richardson III, *supra* note 28, at 125 ("Pursuant to a request by the Court for its views (an unusual request in death penalty cases), the Justice Department, through the Solicitor-General, argued in a brief that the ICJ order did not justify halting Breard's execution, nor did the treaty violations of the Vienna Convention justify a new trial."); *see also* Damrosch, *supra* note 107, at 703 ("In the *Tehran Hostages* case the U.S. Government repeatedly insisted on Iranian compliance with the I.C.J.'s decision and referred to it when issues concerning the international dispute arose in U.S. and foreign tribunals.") (footnotes omitted).

172. *See* Dames & Moore v. Reagan, 453 U.S. 654, 660 (1981) ("[B]ecause lower courts had reached conflicting conclusions on the validity of the President's actions and, as the Solicitor General informed us, unless the Government acted by July 19, 1981, Iran could consider the United States to be in breach of the Executive Agreement."); *see also* FALK, *supra* note 157, at 131. ("By order of the Supreme Court, the Solicitor General [has been] invited to express the views of the United States on [certain] litigation.").

derived from the statement will likely be short-lived. Nevertheless, it might endanger the U.S. position as a litigant in pending and future cases before the World Court,[173] and, in turn, produce other disadvantages.[174] The executive will interfere when necessary. It may interfere to clarify international legal questions or to protect foreign affairs interests.

U.S. v. Pink illustrates judicial deference to the executive. In *Pink*, the Court held "that the conduct of foreign relations is committed by the Constitution to the political departments of the Federal Government; that the propriety of the exercise of that power is not open to judicial inquiry."[175] The Court upheld the *Litvinov Agreement*, as its political relevance was underlined by the executive, despite New York's argument that enforcement of decrees based on the agreement is contrary to the public policy of the state.[176] *Pink* "confers upon the executive decision-maker the primary responsibility for determining the jurisdictional relevance of contending public order systems."[177] *Breard* and *Pink* together suggest that had the executive proffered the I.C.J. case and treated negotiations with Paraguay as important, the Supreme Court would

---

173. *See* Damrosch, *supra* note 107, at 703 ("Because the United States has been a frequent litigant at the I.C.J. (both as applicant and as respondent) and is currently before the Court in several other cases, such potential consequences should not be ignored.").

174. *See* B. H. Oxman, *Jurisdiction and Power to Indicate Provisional Measures, in* THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 333 (ed. Lori Fiscler Damrosch ed., 1987). According to Oxman,

> Whether or not theoretically binding, provisional measures have real effects. A government that does not respect the measures may risk the following consequences, among others:
>
> —if it loses the case on the merits, liability for damages for losses suffered by the opposing party during the interim period;
>
> . . . .
>
> —weakening the credibility of its respect for law, including its ability to encourage respect for law by foreign states as well as its own citizens;
>
> —increasing the likelihood of criticism from foreign states directly or in the form of U.N. action;
>
> —weakening the legitimacy of its bargaining posture and deepening its dispute with the other party;
>
> —increasing the probability that the other party may resort to self-help;
>
> —weakening the fabric of international institutions on which it, along with other states, relies to maintain international order.

Id.

175. U.S. v. Pink, 315 U.S. 203, 222-23 (1942).

176. *See id.* at 223.

177. FALK, *supra* note 157, at 62.

have shown deference.

As mentioned above, this case might easily have reciprocal effects concerning U.S. citizens abroad. Here, the stance amounted to renouncing the authority of the President. Unlike the usual and accepted practice, the stance was not intended to protect U.S. citizens abroad.[178]

The U.S. government could have adopted a policy of "political internalization," which "[o]ccurs when the political elites accept an international norm and advocate its adoption as a matter of government policy."[179] The World Court ordered the United States to undertake "all necessary measures at its disposal." However, separation of powers as a constitutional structural limitation was not the reason for the U.S. government's non-compliance with the order.

Another implication, as seen through the system of checks and balances, is that foreign affairs issues can be properly protected and solved by the activism of the courts. If all branches act as one and the judiciary does not refrain from its usual adjudicatory function, foreign affairs interests can be protected by the courts themselves.[180] However, this is not a novel concept, as courts have tried to protect foreign affairs issues and the interests of the nation as a whole before,[181] by speaking with one voice. This principle was first introduced in *Youngstown Sheet & Tube Co. v. Bowers,*[182] and confirmed and broadened by *Baker v. Carr*: "The cases concerning war or foreign affairs, for example, are usually explained by the necessity of the country's speaking with one voice in such matters."[183]

In accordance with precedent, the Supreme Court should have undertaken a "searching scrutiny" of state actions affecting U.S. foreign relations that may provoke consequences for the nation as a

178. *See* Vazquez, *supra* note 83, at 689 ("It was not that long ago that President Clinton relied at least in part on the need to protect U.S. citizens abroad in defending his decision to launch a military intervention in Haiti in the face of congressional opposition and without even a plausible claim that the threat to U.S. citizens there amounted to any sort of emergency.").

179. Koh, *supra* note 68, at 641.

180. *See* Sandra Day O'Connor, *supra* note 77, at 17.

181. *See, e.g.*, O'Connor v. United States, 479 U.S. 27, 107 S. Ct. 347 (1986); People of Saipan, 502 F.2d 90; Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 84 S. Ct. 923 (1964); Zschernig v. Miller, 389 U.S. 429 (1968).

182. Youngstown Sheet & Tube Co. v. Bowers, 358 U.S. 534, 556 (1959) ("For the effective exercise of this control it was necessary that the Government speak with one voice when regulating commercial intercourse with foreign nations.").

183. Baker v. Carr, 369 U.S. 186, 281 (1962).

whole. Such scrutiny should have extended both to the issues under the Vienna Convention and to the new considerations deriving from the I.C.J.'s ruling on provisional measures.[184]

Therefore, in *Breard*, the Supreme Court may have taken this obligation into account on its own in order to protect the international interests and reputation of the United States.

B. The Federal and State Governments: Federalism

The exclusive state jurisdiction arguably prevented the federal government from interfering in Breard's execution. The United States claimed before the I.C.J. that domestic restraints of federalism left the federal government without effective remedies for dealing with the issue. However, one finds that there were ways for the executive to effectuate the request of the I.C.J. as a matter of foreign policy.

Missouri v. Holland[185] ruled that the federal government has exclusive authority in foreign affairs, and that the states' constitutional prerogatives cannot limit the U.S. government from undertaking and enforcing international obligations. "[C]ongressional authority regarding foreign affairs and treaty enforcement has long been thought to be far less vulnerable to federalism-based challenges than domestic legislation . . . ."[186] This rule was confirmed by subsequent decisions as well as by the Restatement.[187] In *Pink*, the Court stated that "power over external affairs is not shared by the States; it is vested in the national government exclusively."[188] This attitude, however, was not new, as it was announced in earlier decisions, such as *Chae Chan Ping*,[189] *Curtiss-Wright*[190] and *Belmont*.[191]

Another of those decisions is *Zscherning v. Miller*, which underscored the supremacy of the federal government in foreign

184. *See* Damrosch, *supra* note 107, at 703.

185. Missouri v. Holland, 252 U.S. 416, 40 S.Ct. 382 (1920).

186. Vazquez, *supra* note 83, at 687.

187. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1986).

188. Pink, 315 U.S. at 233.

189. Chae Chan Ping, 130 U.S. at 606 ("For local interests the several States of the Union exist, but for national purposes, embracing our relation with foreign nations, we are but one people, one nation, one power.").

190. Curtiss-Wright, 299 U.S. 304.

191. United States v. Belmont, 301 U.S. 324 (1937).

affairs matters by finding states' intrusion into the fields of foreign affairs unconstitutional.[192] The similarity of *Zscherning* and *Breard* lies in state performance contrary to the foreign affairs of the U.S. as a whole. The Supreme Court held an Oregon statute unconstitutional as it intruded on an area reserved for the President and Congress.[193] In *Breard*, the Court deferred to the state's jurisdiction. Also, both cases included the legal interests of aliens and their protection under a foreign affairs shield. The powers of the President in foreign affairs showed a considerable expansion with respect to the other two branches of the federal government.[194] The control of foreign relations has been determined to be in the hands of the federal government. One of the reasons is that "state and local activities may sometimes directly impede or frustrate national foreign policy or embarrass our foreign relations by causing offense or injury to foreign nations, their citizens, and their economic interests."[195] If a certain issue falls within the area of foreign affairs, the executive has the right to interfere in order to follow constitutional requirements and enable the nation to speak with one voice. If the threat to U.S. international obligations is imminent, the rationale for interference is even stronger. The *Breard* matter clearly involved imminent danger and injury to U.S. treaty obligations.

Arguing before the I.C.J., the U.S. government showed deference to state authorities in *Breard*, which was not sustainable, or at least not reasonable.[196] In addition, such an argument is

192. *See* Zscherning v. Miller, 389 U.S. 429 (1968). In *Zscherning*, an Oregon probate statute provided for escheat of a decedent's property in preference to a nonresident alien's claim to inherit it unless the alien's country allowed U.S. citizens to inherit under similar circumstances, allowed U.S. citizens to receive payment here of funds inherited there, and gave foreign heirs the right to receive the proceeds of Oregon estates without confiscation. *Id.* at 430-31. The Supreme Court struck down the statute, finding that Oregon probate and appellate judges were basing their decisions on "foreign policy attitudes, the freezing or thawing of the 'cold war.'" *Id.* at 437.

193. *See generally* Frederick L. Kirgis, *Agora:* Breard, Zscherning v. Miller *and the* Breard *Matter,* 92 AM. J. INT'L L. 704 (1998).

194. *See generally* Nathan J. Diament, *Foreign Relations and Our Domestic Constitution: Broadening the Discourse*, 30 CONN. L. REV. 911; *see also* HAROLD H. KOH, THE NATIONAL SECURITY CONSTITUTION 96 (1990).

195. Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 AM. J. INT'L L. 821, 827 (1989).

196. *See* William J. Aceves, Application of the Vienna Convention on Consular Relations (Paraguay v. United States), Provisional Measures Order, International Court of Justice, April 9, 1998, 92 AM. J. INT'L L. 517, 523 (1998) ("Entrusting the final decision on compliance with treaty obligations and provisional measures

inconsistent with both U.S. and international law. Federal authority dealing with foreign affairs issues preempts state authority.[197] Still, the U.S. Secretary of State told the Governor of Virginia that the execution of Breard would involve foreign policy implications and expose the federal government to possible violations of international law and embarrassment. That was definitively correct and in accordance with well-established practice. Although the United States used the constitutionally mandated issue of federalism as a reason to not comply with the I.C.J. order and take responsibility for Virginia's violation of the Vienna Convention on Consular Relations, it still acted adversely. Structural limitations of this kind would not prevent it from acting this way. Moreover, it was legally empowered to go further and demand the stay of execution as interfering with foreign policy.[198] The letter[199] itself looked more like an inducement based on the statement of facts rather than a request.[200] The U.S. government again did not use all means at its disposal to prevent the execution and consequent grave violations of international instruments.[201]

However, the Governor of Virginia did not act in accordance with the letter. Balancing the local enforcement of criminal justice and the seemingly non-mandatory rulings of the I.C.J., he chose to protect the former. The conduct of foreign affairs is not in the governor's competence while the local criminal jurisdiction certainly is. Still, he must have foreseen the consequences. "[S]hould the International Court resolve this matter in Paraguay's favor, it would be difficult having delayed the execution so that the International

---

ordered by the I.C.J. to state rather than federal authorities is disquieting.").

197. *See* Bradley & Goldsmith, *supra* note 134, at 675 ("Conventional wisdom tells us that this country's federal structure is irrelevant to the national Government's exercise of its foreign relations power.").

198. *See infra* Part II.C.

199. *See* Linda Greenhouse, *Court Weighs Execution of Foreigner,* N.Y. TIMES, Apr. 14, 1998, at A14.

200. *See* Charney & Reisman, *supra* note 101, at 673 ("The 'measures at [the United States'] disposal under our Constitution may in some cases include only persuasion—such as the Secretary of State's request to the Governor of Virginia to stay Breard's execution—and not the legal compulsion through the judicial system.").

201. *See* Henkin, *supra* note 104, at 680-81 ("The Department of Justice did not take other measures to obtain compliance by the state of Virginia with the treaty obligation of the United States to stay the execution. . . . [T]he President (the executive branch) was obliged to make stronger, 'mandatory' representations to the Governor of Virginia, stressing the legal obligation of the United States to stay the execution, and the constitutional duty of the Governor to act on that obligation.").

Court could consider the case to then carry out the jury's sentence despite the rulings [of] the International Court."[202] Nevertheless, the governor ordered Breard's execution.

U.S. arguments of this kind rely largely on the fact that the federal government does not interfere with states' criminal justice systems. However, there have been times when the executive branch has made substantive impact on state criminal justice in the name of foreign affairs and international law. For instance, one incident involved the United Kingdom, Germany, the Council of Europe, the United States, and a German national, Jens Soering.[203] Soering was charged with capital murder in the U.S. state of Virginia. There was a high probability of a death sentence. By that time, he had already managed to escape. According to the 1972 Treaty on Extradition between the United Kingdom and the United States, the United Kingdom was about to extradite Soering to the United States so that he could be tried in a Virginia criminal court.[204] However, the United Kingdom is a member of the European Convention for the Protection of Human Rights and Fundamental Freedoms,[205] which, in Article 3, forbids, *inter alia*, torture and inhuman or degrading treatment or punishment. The European court found that extradition under these circumstances would amount to a violation of Article 3, as Soering would be put on death row. The court found that the death row dynamic, which was inevitable if he had been sentenced to death, amounted to forbidden treatment. The United Kingdom was in a position to violate one of its international obligations, either to the United States or to the other members of the European Convention. The U.S. federal government guaranteed the United Kingdom that Soering would not be prosecuted for capital murder in the Virginia state court and hence the imposition of the death penalty was removed. In a diplomatic letter written on July 31, 1989, U.S.

202. Commonwealth of Virginia, Office of the Governor, Press Office, Statement by Governor Jim Gilmor Concerning the Execution of Angel Breard (Apr. 14, 1998), *in* Charney & Reisman, *supra* note 101, at 674-75.

203. Soering v. United Kingdom, 11 Eur. Ct. H.R. at 439. This case was instituted before the European Court of Human Rights by Soering, who was waiting for extradition to the United States.

204. *See* Richard B. Lillich, *The Soering Case*, 85 AM. J. INT'L L. 128, 129 (1991); *see also,* Diane Marie Amman, *A Whipsaw Cuts Both Ways: The Privilege Against Self-Incrimination in an International Context*, 45 UCLA L. REV. 1201, 1295 n.310 (1998).

205. European Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953, 213 U.N.T.S. 221, E.T.S.

authorities made assurances that U.S. laws, in accordance with the 1972 Extradition Treaty, would prohibit the applicants from being prosecuted for capital murder in Virginia.[206]

As the threat of the death penalty was eliminated,[207] the United Kingdom eventually extradited Soering to the United States. The executive branch demonstrated an influence on a state's criminal justice system when foreign relations or international law questions demanded such action. The similarity of the *Breard* and *Soering* cases is striking. "The Soering case provides a sensational example of how a state law prosecution can implicate the foreign affairs of the United States and subject a state's standards of criminal justice to legal inquiry in a human rights tribunal."[208] It also shows how the federal government can successfully intervene. Moreover, in Soering's diplomatic incident, the United States was not in violation of the treaty, whereas in *Breard*, violations of international law were at stake.

C. Executive Orders and Executive Agreements

The President could have issued an executive order using federal authority to stop the execution.[209] It would not have greatly intruded upon the states' constitutional prerogatives as the order might have

---

206. *See* Appendix to Resolution DH (90) 8, Mar. 12 1990, *in* Information Sheet No. 26 (Council of Europe), at 116.

207. *See Extradition Allowed*, WASH. POST, Nov. 22, 1989, at B7 ("Bedford County Commonwealth's Attorney Jim Updike agreed to downgrade the charge to first-degree murder.").

208. Ronan Doherty, *Foreign Affairs v. Federalism: How State Control of Criminal Law Implicates Federal Responsibility Under International Law*, 82 VA. L. REV. 1281, 1303 (1996).

209. *See* Ordonez & Reilly, *supra* note 58, at 353. According to Ordonez and Reilly,

> [i]n *Narenji v. Civiletti*, 617 F.2d 745, 747 (D.C. Cir. 1979), the plaintiffs challenged an executive regulation requiring Iranian post-secondary students in the United States to register their residence and maintain non-immigrant status. The regulation was issued in response to the continuing hostage crisis in Iran. In order to uphold the regulation, the appellate court had to find a rational basis for the Executive Branch's actions. The court used the I.C.J. decision as preclusive on the issue of whether Iran's actions in the hostage situation violated international law, declaring that "the lawlessness of this conduct of the Iranian government was recognized by the decision of the World Court." Iran's conduct was construed to provide the rational basis necessary for the court to find the regulation within the Attorney General's authority and to uphold its constitutionality."

Id.

been limited to a temporary postponement. "The Constitution leaves the resolution of such an issue [i.e., the international obligation to comply with a provisional measures order,] largely to the elected officials in the federal government."[210]

An executive agreement between the United States and Paraguay was also an option. Such an act would have been given protection under the Supremacy Clause, avoiding possible challenges under the Tenth Amendment of the U.S. Constitution.[211]

Diplomatic negotiations could have prevented the negative consequences of this incident and ended it before it reached the World Court. Diplomatic means for settling disputes are seen as an effective and desirable remedy. Negotiations and diplomatic relations are without doubt within the province of the executive, where it is expected to show skill, speed and professionalism in protecting national interests.

The executive should have undertaken steps to internalize the provisional measures order, rather than proclaiming its legal ineffectiveness.[212] There were several ways to accomplish this by using exclusive executive prerogatives. "[The President] possesses the whole Executive power.... He is charged to execute the laws. A treaty is ... a law. He must, then, execute a treaty, where, he, and he alone, possesses the means of executing."[213] The reasons for not using executive prerogatives can be found only in political considerations. The executive probably did not see the protection of Paraguay, its

---

210. Bradley & Goldsmith, *supra* note 134, at 678.

211. The *Missouri v. Holland* Court ruled that treaties cannot be challenged under the Tenth Amendment of the U.S. Constitution. Missouri v. Holland, 252 U.S. 416 (1920). The executive agreements gained Supremacy Clause protection over time. U.S. courts have treated some executive agreements dealing with the position of individuals as treaties. *See, e.g.*, Reid v. Covert, 354 U.S. 1 (1957), Weinberger v. Rossi, 456 U.S. 25 (1982).

212. *See* Koh, *supra* note 68, at 645. Koh argues as follows:

> At that point, the Nicaraguans shifted from an international interpretive forum—the World Court—to a domestic enforcement forum: the U.S. Congress, where resolutions were introduced terminating future aid to the Contras for activities that violated the World Court's ruling. In other words, Congress internalized the World Court's ruling into U.S. law. Almost immediately thereafter, the Reagan Administration stopped mining the harbors. In short, an interaction, interpretation, and internalization of an international norm into domestic law helped force the United States into obedience.

Id. (footnotes omitted).

213. Paul, *supra* note 76, at 690 (footnotes omitted).

citizens, and international law as action beneficial to U.S. interests.

D. Conclusions Regarding the Constitutional Arguments

In the eyes of international law and the I.C.J., Virginia, its governor, the U.S. Supreme Court, the Department of Justice, and the Secretary of State are agencies[214] of the United States for which the U.S. government is responsible on the international plane.[215] In

---

214. *See* Henkin, *supra* note 104, at 681 ("The U.S. Supreme Court—an agency of 'the United States'—refused to order that the execution be stayed. The Governor of Virginia—also, in law, in fact, 'acting for the United States'—clearly had authority to stay the execution but refused to do so.").

215. The Draft Articles on State Responsibility of the U.N. International Law Commission, which is considered to be the codification of customary international law, confirms this rule:

> Article 5 (Attribution to the State of the conduct of its organs)
>
> For the purposes of the present articles, conduct of any State organ having that status under the internal law of that State shall be considered as an act of the State concerned under international law, provided that organ was acting in that capacity in the case in question.
>
> Article 6 (Irrelevance of the position of the organ in the organization of the State)
>
> The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character, and whether it holds a superior or a subordinate position in the organization of the State.
>
> Article 7 (Attribution to the State of the conduct of other entities empowered to exercise elements of government authority)
>
> 1. The conduct of an organ of a territorial governmental entity within a State shall also be considered as an act of that State under international law, provided that organ was acting in that capacity in the case in question.
>
> 2. The conduct of an organ of an entity which is not part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall also be considered as an act of the State under international law, provided that organ was acting in that capacity in the case in question.

37 I.L.M. 440 (Draft Articles on State Responsibility of the U.N. Int'l Law Comm'n 1998).

Roberto Ago, who was a special rapporteur, explained the exact meaning of the territorial unit, as envisaged in the present Draft Articles. The territorial unit of the State comprises municipality, province, region, canton, federal unit, autonomous administration of dependant territory, etc. *See* Roberto Ago, Third Report on the Responsibility of States, YILC/II 33 (1976).

For a detailed discussion of this issue, see Verdross, Theorie der Mittelbaren Staatenhaftung, *in* OSTERREISHISCHE ZCITSCHRIFT FÜR ÖFFENTLICHES RECHT, 338 (vol. I 1948).

the absence of any provision to the contrary, international conventions are to be applied to the entire territory of state parties.[216] States may include federal clauses in treaties, but due to constitutional restraints, it is impossible to fully implement treaty provisions into state jurisdictions and thereby impose responsibility for the acts of federal units. The Vienna Convention on Consular Relations does not contain any federal restrictions.

Steps that were undertaken by the executive, moreover, were inconsistent. The first inconsistency was displayed in the actions before the World Court and within the domestic arena. The second set of contradictory steps took place in the area of structural limitations, emanating from different acts toward the Supreme Court and the State of Virginia.

The executive branch, as the sole organ of international relations, could have shown stronger determination in following the rule of law in the international arena, and more activism in the domestic arena, in order to reconcile differing demands. The horizontal legal order might have been respected in the vertically structured national order. The executive could have pursued the protection of international law independently from the other branches of the federal government by issuing an order, initiating diplomatic negotiations, or trying to reach an executive agreement that would have been enforceable in the courts without direct interference with the judicial branch. On the other hand, the executive could have interfered with the proceeding more directly: it was invited by the Court to state the relevance of the case before the I.C.J. The Solicitor General's letter indicating the binding character of the order would have been a sufficient pledge of the United States' commitment to international law before the I.C.J. The executive could have used the rhetoric of "expediency discourse,"[217] invoking both the urgency that had arisen from *Breard* and the ongoing diplomatic negotiations with Paraguay. The expediency argument would have shown the Supreme Court that an unfavorable judgment would interfere with foreign affairs. Unfortunately, the executive's measures went the opposite direction and contributed to the

216. *See* Vienna Convention on the Law of Treaties, 1969, art 26.

217. *See* Paul, *supra* note 76, at 711 ("Expediency discourse justified the executive's intervention in the courts' subject-matter jurisdiction. In effect, the executive now stood as the gatekeeper to the judicial process in cases challenging foreign laws.").

international law violations in the Breard drama.

III. The Human Rights Argument

The way that international human rights arguments penetrate into a domestic system is quite unique and important. Their strength, as well as the firm consensus regarding their meaning, significance and functions, enable them to have at least an indirect impact on internal law. Reasons for supporting human rights arguments originate from moral and progressive ideas, as well as from the necessity to uniformly regulate all individuals as human beings. These reasons stem from the concept of democracy. This argument is weaker compared to ones previously analyzed. On the other hand, it operates differently. Its structure makes it incompatible for direct implementation, but the material elements and substantive strength of such an argument may contribute to its considerable importance.[218]

International human rights have been supported by U.S. courts under the doctrine of customary international law. The existence of such rules, fortified by the Alien Tort Claims Act and the willingness of courts to hear and positively solve these types of cases, enabled the resurrection of international custom in U.S. courts.[219] Shifting the problem from more formal elements to the idea of material justice and human rights opens the door for its application. Moreover, arguments put forward in favor of *jus cogens*, or comity, resemble the technique of customary international legal arguments.

---

218. The United States has failed to accept some of the major treaties for the protection of human rights:

> This . . . shows that litigants rarely raise treaty-based human rights claims. Moreover, when litigants do raise such claims, courts usually do not even mention the NSE declarations. Out of fourteen cases in which litigants did raise treaty-based human rights claims, only three judicial opinions mention the NSE declaration, and in two of those cases the issue is relegated to a single footnote. In short, both advocates and judges have failed to appreciate the possibilities for judicial application of human rights treaties to which the United States is a party.

David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129, 203 (1999) (footnotes omitted). On this point, see also FRANCK & GLENNON, *supra* note 64, at 353.

219. *See* Filatriga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980); Kadic v. Karadzic, 74 F.3d 377 (2d Cir. 1996); Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987), *modified by* 694 F. Supp. 707 (N.D. Cal. 1988); Von Dardel v. U.S.S.R., 623 F. Supp. 246 (D.D.C. 1985), *vacated by* 736 F. Supp. 1 (D.D.C. 1990); Fernandez v. Wilkinson, 505 F. Supp. 787 (D.C. Kan. 1980).

I first examine the human rights issues opened in *Breard* since the I.C.J. order did not address these questions directly. These issues might be seen as part of a larger framework and as one of the problems opened by the whole diplomatic incident and the mere existence of these cases.[220] Human rights issues in *Breard* might go unnoticed in the sea of other arguments. The issues could be divided into several specific rights, such as the right to life, the right to a fair trial, the right to access a consul, and the freedom from the denial of justice.

Human rights issues received greater acceptance and understanding regarding the issuance of the provisional measures in *LaGrand*, which was decided before the I.C.J. a year after *Breard*. Germany instituted proceedings against the United States before the I.C.J. on March 2, 1999, alleging violations of the Vienna Convention on Consular Relations. The facts of the proceeding are almost identical to the those in *Breard*. The I.C.J. unanimously issued a provisional measures order on March 3rd obliging the United States to do what it was supposed to do in the *Breard* matter—stay the execution.[221] Humanitarian considerations seemed to be clearer this time, as was indicated in the declaration of Judge Oda, appended to the order. He disagreed with the court's finding to a large extent, but decided to vote in favor of it exclusively for humanitarian reasons.[222]

Although the I.C.J. did not refer to this question in the operative part of the order, it indirectly dealt with these issues by mentioning human rights in its reasoning.[223] This aspect itself might have helped

---

220. *See* Richardson III, *supra* note 28, at 121 ("When the Commonwealth of Virginia executed Angel Breard on April 14, 1998, the United States violated international law. The rule of law in the international community was affronted in several ways by the outpouring of official dualsim throughout all phases of this case, *particularly regarding human rights* and the respect due decisions of the International Court of Justice . . . .") (emphasis added).

221. *See* General List No. 104, Mar. 3, 1999, Press Communiqué 99/9, *available at* <http://www.I.C.J.-cij.org/I.C.J.www/idocket/igus/igusframe.htm>.

222. LaGrand (F.R.G. v. U.S.), Mar. 3 1999 ("I reiterate and emphasize that I voted in favour of the Order solely for humanitarian reasons.") (Oda, J., concurring), *available at* <http://www.I.C.J.-cij.org/I.C.J.www/idocket/igus/igusframe.htm>.

223. Concerning the Vienna Convention on Consular Relations, (Para. v. U.S.), para. 8. The opinion states as follows:

> Whereas, in its request for the indication of provisional measures of protection . . . it emphasizes that "[t]he importance and sanctity of an individual human life are well established in international law" and "[a]s recognized by Article 6 of the International Covenant on Civil and Political Rights, every human being has the inherent right to life and this right shall

the U.S. courts to see the order in another light.[224] "Reference to judgments or advisory opinions of the I.C.J. and P.C.I.J. has on the whole been motivated by criteria of expediency, whether political (the interest of the government) or economic (the interest of the nationals), but sometimes also, it would appear, by *humanitarian considerations*."[225] The U.S. courts showed respect for the I.C.J. decisions in the light of humanitarian considerations in *Siderman de Blake v. Republic of Argentina*.[226] The courts analyzed the character of *jus cogens* norms in the area of human rights invoking I.C.J. decisions.[227]

Humanitarian considerations can raise this issue indirectly and separately, since human rights issues were not treated in depth by any of the courts in the *Breard* matter. Domestic courts may depart from the traditional horizontal aspect of international law when human rights are at stake. The internal configuration of human rights inevitably establishes a vertical structure. Therefore, this issue can be viewed in the context of international law in domestic systems and individual rights:

> This is the domestic constitutional argument. A similar one can be made in the international context. While it is sometimes said that international law falls outside the scope of the judicial function or expertise, this depends on how one conceives of international law. When international law protects individual rights against

---

be protected by law;" . . . provisional measures are urgently needed to protect the life of Paraguay's national and the ability of this Court to order the relief to which Paraguay is entitled: restitution in kind.

Id.

224. Provisional measures can be also seen as a humanitarian device, trying to prevent irreparable harm to human rights. *See generally*, Rosalyn Higgins, *Interim Measures for the Protection of Human Rights*, in: *Politics, Values and Functions: International Law in the 21st Century* 87 (Jonathan I.Charney, Donald K. Anton & Mary Ellen O'Connel eds, 1997).

225. Bedjaoui, *supra* note 44, at 62-63 (footnotes omitted) (emphasis added).

226. Siderman de Blake v. Republic of Arg., 965 F.2d 699 (9th Cir. 1992).

227. *Id.* at 715. The court stated as follows:

> The universal and fundamental rights of human beings identified by Nuremberg—rights against genocide, enslavement, and other inhumane acts, are the direct ancestors of the universal and fundamental norms recognized as jus cogens. In the words of the International Court of Justice, these norms, which include "principles and rules concerning the basic rights of the human person," are the concern of all states; "they are obligations—erga omnes." *The Barcelona Traction, Light & Power Co. (Belgium v. Spain)*, 1970 I.C.J. 3, 32.

Id. (footnote omitted).

> governments, then enforcement of international law falls squarely within the traditional notion of judicial responsibility.
>
> ....
>
> If one accepts a vertical approach to international law—that individuals have rights against states that are protected by international norms—then domestic courts are the best vehicles for adjudicating those cases with strong vertical elements.[228]

The mere fact that this case raised issues of international concern involving the international court and other countries, as well as the rules of international law, may diminish the concept of exclusive domestic jurisdiction. This fact, standing alone, may compel courts to depart from provincialism.[229]

The right to life is the most important of all human rights, and the source of all other personal rights. Commitment to a society founded on the recognition of human rights requires valuing this right. Respect for life on the international plane is necessary.[230] On the other hand, the death penalty cannot be seen as contrary under international law. The death penalty is a legitimate state action.[231] Although all members of the Council of Europe and European Court for Human Rights abolished the death penalty as a denial of the right to life, their stance is not based on general international law, but on a particular treaty obligation—Protocol IV of the European Convention for the Protection of Human Rights and Fundamental

---

228. Brilmayer, *supra* note 105, at 2308 (footnotes omitted).

229. *See* Anthony D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1125-1127 (1982).

230. *See generally* International Covenant on Civil and Political Rights, G. A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 171, U.N. Doc. A/6316 (1966) [hereinafter ICCPR]; American Convention on Human Rights, 1969, art. 4.2, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, 213 U.N.T.S. 221, E.T.S. 5 (1953); African [Banjul] Charter on Human and Peoples' Rights, 1981, art. 4, O.A.U. Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982). Customary international law protects this right as well, and some declarations are the proof of the binding effect of this customary rule, such as the Universal Declaration of Human Rights, art. 3, G. A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948).

231. *See* Bekker & Highet, *supra* note 3, at 38 ("At the same time, the [I.C.J.] made it clear that the case does not concern the right of U.S. federal states to resort to the death penalty and that the Court's function is to resolve international legal disputes between sovereign states and not to act as a universal supreme court of criminal appeal.").

Freedoms.[232]

The performance of state functions and the right to life can be seen as relative concepts that demand more careful examination and a balancing test, since none of those principles is absolute and unconditional. They cannot be treated as isolated and distinct categories because they are deeply interconnected. The right to life is faced with certain restrictions, and its antithesis, the death penalty, is faced with analogous requirements. Due to a right to life, strict scrutiny must be applied in examining impositions of a death sentence.[233] All necessary elements must be present in order to justify the deprivation of someone's life, which also includes international standards. The Human Rights Committee (HRC), interpreting the ICCPR, has reached a consistent approach:

> Members [of the ICCPR] have comprehensively dealt with all facets of this matter including the six express limitations on the imposition and implementation of a sentence of death. Such a sentence (a) may only be imposed for the most serious crimes; *(b) must be in accordance with the law in force at the time of the commission of the crime;* (c) must not be contrary to the other provisions of the Covenant or the Genocide Convention; (d) can only be carried out pursuant to a final judgment rendered by a competent court; (e) shall not be imposed for crimes committed by persons below 18 years of age and shall not be carried out on pregnant women; (f) any person sentenced to death shall have the right to seek pardon or commutation of the sentence.[234]

If international standards are not met, even while domestic requirements are fulfilled, the focus shifts from constitutional, criminal, and procedural issues to the right to life seen on the

---

232. European Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953, 213 U.N.T.S. 221, E.T.S. 5.

233. *See* General Comment 6(16), Doc. A/37/40, para. 6, Doc. CCPR/C/21/Add.1 (adopted by the HRC at its 378th meeting, July, 1982). According to the HRC,

> While it follows from article 6(2) and (6) that States parties are not obliged to abolish the death penalty totally, they are obliged to limit its use and, in particular, to abolish it for other than the "most serious crimes." Accordingly, they ought to consider reviewing their criminal laws in this light and, in any event, to restrict the application of the death penalty to the "most serious crimes." The article also refers generally to abolition in terms which strongly suggest (paras. (2) and (6)) that abolition is desirable.

Id.

234. DOMINIC MCGOLDRICK, THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 332 (1994) (emphasis added).

international plane. In *Breard*, one finds deficiencies in the criminal procedure that resulted in the imposition and execution of the death penalty. Not only did the sentence arguably violate international law, but also the conviction of Breard lacked certain procedural requirements necessary for the protection of the accused. Breard's right to access to a consul practically amounted to the right to a fair trial, which is the international standard of the U.S. concept of due process of law. The issue here can be expanded, since international law regulates the minimum of procedural requirements regarding aliens. The Court might have seen the violation of international procedural safeguards as the violation of due process under the U.S. Constitution. In that case, there is a demand for strict scrutiny as the violation of the international procedural safeguards risks international affairs.[235]

Both United States law and international law protect the right to access to a consul. Moreover, when a foreign national faces judicial proceedings in a foreign country, several basic human rights are implicated including the right to due process, adequate counsel, and an interpreter. Many of these rights are also guaranteed by the U.S. Constitution and enforced by U.S. courts.[236]

Another element supporting the argument that the international procedural requirement should have been seen as a violation of due process is the violation of Articles 6(2) and 15 of the ICCPR,[237]

---

235. *See generally* Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235 (1993).

236. *See* Victor M. Uribe, *Consuls as Work: Universal Instruments of Human Rights and Consular Protection in the Context of Criminal* Justice, 19 HOUS. J. INT'L L. 375, 378 (1997).

237. Article 6(2) states:

> In countries which have not abolished the death penalty, a sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement of a competent court.

Id. art 6(2). Article 15(1) states,

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

Id. art. 15(1).

prohibiting the retroactive application of laws that disadvantage individuals in criminal cases. The violation of this requirement by the United States deprived Breard of the ability to raise his claim in the federal courts. The ex post facto law cannot be applied after the proceeding has already commenced. Breard could have raised a habeas corpus claim in the federal courts when the proceeding started in 1992. When the Antiterrorism and Effective Death Penalty Act came into force in 1996, he could no longer file a petition for a writ of habeas corpus when the case reached the federal courts. Moreover, he could have used this claim in state courts but he did not know of this possibility. Since Breard's U.S. counsel did not raise this issue in the state courts, nor did they tell him of his right to obtain counsel, he was obviously advised improperly. One of the possible options for the courts was to take into account that he had been inadequately represented. The initial violation of Article 6(2) of the ICCPR developed a vicious circle ending in another international breach - Breard's execution. "*Ex injuria jus oritur*" accurately describes the defense argument of the United States before the I.C.J.

The U.S. Supreme Court stated that even if Breard had had access to a consul, it would not have changed his position or sentence. The Court further stated that "[w]ithout a hearing, Breard cannot establish how the Consul would have advised him, how the advice of his attorneys differed from the advice the Consul could have provided, and what factors he considered in electing to reject the plea bargain that the State offered him."[238] In *Lombera-Camorlinga*, the Ninth Circuit set aside the marijuana conviction of a Mexican national and instructed the district judge to determine whether the officers' failure to notify the man of his consular rights had harmed his defense.[239] This case was decided after *Breard* and clearly shows that the right of access to a consul is an important procedural right of a defendant. In *Lombera*, the court ruled that the violation of the right to consul had to be remedied.

Breard had the right under the Vienna Convention on Consular Relations, the International Convention on Civil and Political Rights,[240] and customary international law regulating the diplomatic

238. Breard, 118 S. Ct. at 1355.

239. Lombera-Camorlinga, 170 F. 3d. at 1244.

240. Uribe, *supra* note 236, at 401 ("[M]any of the ICCPR's general provisions provide consuls with an international legal basis for protection of their nationals.").

protection over aliens[241] to have a consul's advice and a fair trial.[242] International law conceives that an important element of a fair trial, when the proceeding includes aliens, is the right to have the advice of a consul. "The right to consular protection has, at its origin, the basic right of an individual to enjoy protection while in a foreign state."[243] The refusal of due process or a fair trial to aliens represents denial of justice.[244] "[T]he customary right to freedom from 'denial of justice' should have been addressed and should have prevailed [in *Breard*]."[245] This may represent a separate and distinct ground for responsibility under international law. The denial of justice is a different argument than one based on the violation of the Vienna Convention. A denial of justice can exist even when no treaty has been violated. This argument is connected with the treatment of aliens under general international law.

The rights to a fair trial, diplomatic protection, and the advice of a consul naturally fit together. They establish the international procedural due process standard. They also enable the appropriate protection of individuals by both the forum state and the alien's state. Aliens may not know the language of the forum state or understand the domestic laws or remedies. The right of access to a consul serves to balance the inadequate position of aliens and, consequently, equalizes them with nationals of the forum state. The right to a fair

---

241. This is a principle of international law applicable to nationals of one state within the jurisdiction of another state, based on the bond of nationality. "[W]hat the Law of Nations really does concerning individuals is to impose upon all States the duty to grant certain privileges to such foreign Heads of States and diplomatic envoys, and certain rights to such foreign citizens [when in the territory of the foreign state]." H. Lauterpacht, *Lauterpacht's Revision of Oppenheim*, *in* INTERNATIONAL PROTECTION OF HUMAN RIGHTS 5 (Louis B. Sohn & T. Buergenthal eds., 1975).

242. B. SEN, A DIPLOMAT'S HANDBOOK OF INTERNATIONAL LAW AND PRACTICE 323 (1988).

243. Uribe, *supra* note 236, at 390.

244. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 711, cmt. a (1986). According to the Restatement,

> Any injury to an alien for which a state is responsible under this chapter has sometimes been characterized as a "denial of justice." More commonly the phrase "denial of justice" is used narrowly, to refer only to injury consisting of, or resulting from, denial of access to courts, or denial of procedural fairness and due process in relation to judicial proceedings, whether criminal or civil. As regards natural persons, most injuries that in the past would have been characterized as "denials of justice" are now subsumed as human rights violations under clause (a) [of this section].

Id.

245. Paust, *supra* note 81, at 692.

trial is applicable to individuals regardless of their nationality.[246] "Foreign defendants should be entitled to the same due process considerations as U.S. nationals."[247]

The death penalty, as such, is not the issue here. The core humanitarian issue is how the death penalty was imposed on Breard. The violation of human rights, as well as thwarting the diplomatic protection of Paraguay, show deficiencies with respect to international standards. This casts a shadow on the death penalty decision. The right to life is not violated because of the existence of the death penalty. In *Breard*, the right to life was violated because of the way in which the death sentence was imposed and executed. The violations of other human rights, such as the right to access to a consul, the right to a fair trial, and others, are separate human rights issues. However, their sole existence generates arguments that prove the violation of the right to life through the imposition of a death sentence that was invalid under international law.

The violation of these individual rights, as regulated on the international plane, can be viewed domestically either as a possible defense in the criminal proceeding or as a matter of international concern underlined by the existence of the I.C.J. order.[248] Moreover, *Asakura v. City of Seattle*[249] shows that a treaty violation can provide a defense in court proceedings.

In any case, where a defendant in a civil or criminal proceeding initiated by the government invokes a human rights treaty as a defense to the government's charges, the court should reach the merits of the defendant's claim unless the claim is frivolous, relief is available under some other provision of domestic law, or an alternative forum is available in which to adjudicate the claim. Failure to reach the merits of the claim in such cases would be

246. *See* Uribe, *supra* note 236, at 376. According to Uribe,

> Criminal prosecution in a foreign country could significantly reduce the possibility of a fair trial. The danger multiplies for defendants not fluent in the local language or whose understanding of the foreign legal system is lacking. The picture becomes more threatening in countries where the prosecution may still impose the death penalty.

Id. (footnotes omitted).

247. Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1, 77 (1991).

248. *See* Sloss, *supra* note 218, at 213 ("Thus, in cases where a defendant seeks to invoke a human rights treaty as a defense to civil or criminal charges brought by the government, courts should not construe the NSE declarations to violate U.S. treaty obligations, if another possible construction remains .") (footnotes omitted).

249. Asakura v. City of Seattle, 265 U.S. 332 (1924).

inconsistent with the *Charming Betsy* principle.[250]

Another possible approach to the human rights issue in *Breard* is through the *jus cogens* concept. If any peremptory international human right was violated, this would be the most direct way to introduce human rights issues into *Breard*. *Committee of U.S. Citizens Living in Nicaragua* left the door open for the direct implementation of *jus cogens* norms: "Such basic norms of international law as the proscription against murder and slavery may well have the domestic legal effect that appellants suggest. That is, they may well restrain our government in the same way that the Constitution restrains it."[251]

Due to procedural deficiencies, Breard's execution may constitute an arbitrary deprivation of life. The arbitrariness can be found in the denial of justice, since international legal requirements were not fulfilled. Breard was not given the protection regarding the procedural safeguards to which he was entitled under international law. Courts might decide that *jus cogens* prevents an arbitrary taking of life and, therefore, U.S. domestic law would be displaced by *jus cogens*. Another question is whether the death penalty violates peremptory international law.[252]

U.S. domestic legal remedies seemingly fall short of protecting human rights in this context. On the other hand, one cannot help but think that the deficiencies regarding the respect of international human rights were not enough to turn the balancing test in another direction, and enable a stay of the execution. Carrying out the death sentence, despite these humanitarian considerations, amounted to irreparable harm, which had triggered the I.C.J. provisional measures order.[253]

The human rights argument seems to remain exclusively an international argument. The fact that human rights violations were part of the international law issues in this case was not enough for the United States. Other aspects of the U.S. conduct in *Breard* also blur bona fide behavior and evince a lack of concern for human rights—the urgent execution of an individual despite a vigorous international

250. *See* Sloss, *supra* note 218, at 214.

251. 859 F.2d at 941.

252. Professor Gormley has argued that the right to life in Article 6(1) of the ICCPR represents *jus cogens*. *See* W. P. Gormley, *The Right to Life and the Rule of Non-Derogability: Peremptory Norms of Jus Cogens*, *in* THE RIGHT TO LIFE IN INTERNATIONAL LAW 120-59 (Ramcharan ed., 1985).

253. *See* Higgins, *supra* note 224, at 87.

public protest and an apology for it, which had been offered before the execution, as the only appropriate remedy.

This argument may lack domestic legal enforceability, but the political implications, moral considerations, and preponderance of several international human rights arguments could have given weight to a fairly modest request—a stay of the execution. The courts invoked several grounds that activate international human rights arguments in *Breard*: international procedural due process (the right of access to a consul, the prohibition of denial of justice to aliens, and the right to a fair trial), the prohibition of arbitrary deprivation of life (supported by *jus cogens*), and a treaty-based defense in criminal cases. The courts could have shown more activism and a more progressive attitude in examining these issues.

IV. The Comity Argument

The U.S. Supreme Court itself noted the international implications of *Breard*. However, it addressed them indirectly without any in-depth review.[254] The dissenting opinions of Justices Stevens and Breyer focused more on these problems, as they raised the question of international concern, admitting the outbound impact of the Court's decision and the fact that a competent international forum was dealing with the same issue.[255] This point might have been a link to comity, which would have enabled the Court to deal with the whole issue in a different way.

The international concern noted in *Breard* is without any doubt. The foreign state, the International Court, and the foreign national

254. Breard, 118 S. Ct. at 1355 ("It is unfortunate that this matter comes before us while proceedings are pending before the I.C.J. that might have been brought to that court earlier.").

"First, while we should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such. . ." *Id.* at 1354.

"The I.C.J. set a briefing schedule for this matter, with oral argument likely to be held this November. Breard then filed a petition for an original writ of habeas corpus and a stay application in this Court in order to "enforce" the I.C.J.'s order." *Id.* at 1354.

255. Justice Stevens stated, "[T]he international aspects of this case provide an additional reason for adhering to our established rules and procedures." *Id.* at 1356 (Stevens, J., dissenting). Justice Breyer stated, "At the same time, the international aspects of the case have provided us with the advantage of additional briefing even in the short time available. More time would likely mean additional briefing and argument, perhaps, for example on the potential relevance of proceedings in an international forum." *Id.* (Breyer, J., dissenting).

were directly interested in the outcome of the proceeding. State members of the I.C.J., the U.N., and the Vienna Convention were indirectly involved. All the actors, including the State of Virginia and the executive branch, were waiting for the decision of the Court. The implications certainly deserved a more cautious and tolerant approach to the problem, with the possibility of showing the interest-balancing test, courtesy, and respect concomitant to the notion of comity.

Comity is a well-known concept in public international law.[256] However, I am going to use the rhetoric of comity as used in U.S. jurisprudence, which the courts have used to give respect and deference to foreign and international law and the courts. In this case, comity might have been used by the Court to show deference to the interpretation of international law by the international court.[257] If all other means failed, comity would still be able to bridge the gap between the I.C.J. and the U.S. Supreme Court.[258]

Not only does comity have many meanings, it also has many models and functions. Justice Storey made the distinction between

---

256. *See* H. LAUTERPACHT, OPPENHEIM'S INTERNATIONAL LAW 33-35 (1955).

257. Article 36 of the I.C.J. Statute provides:

1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.
2. The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
a. the interpretation of a treaty;
b. any question of international law;
c. the existence of any fact which, if established, would constitute a breach of an international obligation;
d. the nature or extent of the reparation to be made for the breach of an international obligation.

Id. Both general and special jurisdiction of the I.C.J. existed in *Breard.* General jurisdiction was established by Article 36(2) while special jurisdiction was provided by the Optional Protocol appended to the Vienna Convention on Consular Relations.

International courts have the power to give a binding interpretation of a treaty. Examples include European Court of Human Rights and the European Court of Justice.

258. *See* Anne-Marie Slaughter, *Agora:* Breard, *Court to Court*, 92 AM. J. INT'L L. 708, 708 (1998) ("The Supreme Court should have honored this request as a matter of judicial comity, offering the I.C.J. the same respect that U.S. courts are increasingly according their counterparts around the world.").

the "comity of courts" and the "comity of nations."[259] Justice Scalia identified the existence of "the comity of courts," as opposed to legislative comity, in his dissenting opinion in *Hartford Fire Insurance Co. v. California*.[260] He stated as follows:

> The "comity" they refer to is not the comity of courts. Judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere. This might be termed "prescriptive comity," which is the respect sovereign nations afford each other by limiting the reach of their laws.[261]

In *Breard*, the Court need not have resolved this dilemma, as both prescriptive and judicial comity would have connected the I.C.J.'s decision and the ruling of the Supreme Court. This would have favored the I.C.J. and the foreign subject. Comity would have been used as a "bridge."[262] "As a bridge, comity is meant to expand the role of public policy, public law, and international politics in domestic courts."[263]

It is clear that the I.C.J. does not legislate, but it does interpret the rules of the Vienna Convention and international laws in general. The determination of the meaning and scope of the Vienna Convention by the International Court of Justice would certainly have prevailed over the corresponding interpretation by national courts. The Supreme Court acknowledged the I.C.J.'s jurisdiction to interpret the Vienna Convention: "[W]e should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret . . . ."[264]

Judicial comity could also be applied here as a bridge, since, as Justice Scalia stated, comity is when "judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere."[265] The acceptance of the I.C.J.'s determination is supposed to be motivated by its authority, not by its binding quality.[266] I.C.J. judges are certainly experts in international law. Consequently, this forum

---

259. JOSEPH STOREY, COMMENTARIES ON THE CONFLICT OF LAWS § 38, (1834).

260. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting).

261. *Id.*

262. Paul, *supra* note 247, at 5-8.

263. *Id.* at 7.

264. *Breard*, 118 S. Ct. at 1354.

265. *Hartford Fire Ins. Co.*, 509 U.S. at 817 (Scalia, J., dissenting).

266. For more about the acceptance based on the authority of the decisio regardless of its binding effect, see Schreuer, *supra* note 58, at 45.

might be seen as a better place to interpret the treaty as it relates to more than one state party.[267]

Acceptance of the I.C.J.'s jurisdiction through the compromisory clause (Optional Protocol of the Vienna Convention) should be seen as a forum selection issue. The comity jurisprudence supporting the enforcement of such clauses would support the Court's deference to the I.C.J. with the same rationales and reasoning.

The application of an interest-balancing test would have shown the benefits of the comity approach. "Interest balancing is intended to measure the forum's interests against the likelihood that its exercise of jurisdiction might offend a foreign sovereign or cause hardship to a foreign party."[268] The interest estimation can be expanded to cover the international perspective as well, since comity connects different legal systems, and in this case, it would not be foreign and national, but national and international. There are three different groups of interests—those of Paraguay, the United States, and the international system.

A. Paraguay's Interests

Paraguay has two interests of different legal character. The first interest is with respect to consular relations, which also includes the interest of the United States, as consular relations function on a reciprocal basis. This interest is clearly of a public character, as states' interests are directly involved. The second is the interest in Breard, whose private interest became the state's interest due to the nationality bond and the rule of diplomatic protection. Nevertheless, such a private interest becomes public in cases before the I.C.J.

B. The United States' Interests

The position of the United States in the international legal system would be fostered by showing respect for the international rule of law. U.S. respect for international litigation and the willingness of the U.S. courts to cooperate with international tribunals would also be confirmed. There was no threat to U.S. sovereignty, as this cooperation "does not import subordination."[269] Furthermore, U.S. consular relations and U.S. consular protection of

267. *See* FALK, *supra* note 157, at 176 (1964).
268. Paul, *supra* note 247, at 61.
269. Slaughter, *supra* note 258, at 711.

its citizens might be endangered by a reciprocal lack of respect by foreign states. Not only Paraguay, but other countries as well, may refuse to provide U.S. nationals with notification and access to consuls when they are arrested.[270] *Breard* could have been an example of respect for the rule of law and the importance of consular protection for other countries. A more in-depth interest-balancing test would have provided the Court with another perspective. "The Supreme Court thus had little to lose, but much to gain."[271]

C. The International System's Interests

The I.C.J. has an interest in the exercise of its jurisdiction. Deference to the I.C.J.'s decision would not have gone further than to stay the execution. This court was directly interested in compliance with international treaties. Other state members of the court and the Vienna Convention might be concerned about the functioning of the international legal order.

Courts may use comity without special reference to this interest-balancing. "Guided by notions of comity, courts consider competing foreign and domestic interests."[272] Such a view was present in *National Airmotive v. Iran*,[273] where the court accepted the holding of the I.C.J.'s decision in *Diplomatic and Consular Staff in Tehran, (U.S. v. Iran)*.[274] Our suggestion is that deeper analysis in *Breard* would have certainly discovered an interest in a different holding.[275]

The modern trend of globalization has many facets. It should be encouraged, especially when no threat to sovereignty exists. Globalization inevitably introduces transparency which opens

---

270. *See* FALK, *supra* note 157, at 46 ("Reciprocity is closely related to the horizontal conceptions of self-restraint and estoppel. . . . The relation of reciprocity to estoppel is merely that it is difficult for an asserting state to challenge a similar assertion by another state in the future.").

271. *Id.* at 712.

272. Paul, *supra* note 247, at 1 (footnote omitted).

273. National Airmotive v. Iran, 491 F. Supp. 555 (D.D.C. 1980).

274. U.S. Diplomatic and Consular Staff in Tehran, (U.S. v. Iran), 1979 I.C.J. 21.

275. The Supreme Court made some policy-orientated reference: "It is unfortunate that this matter comes before us while proceedings are pending before the ICJ that might have been brought to that court earlier." Breard, 118 S. Ct. at 1356. Its exact meaning is not quite clear. One possible explanation is that the Court was balancing acting in good faith and interest with the motives of the actors in this case. Otherwise, the time factor is without meaning for the Supreme Court because it is highly unlikely that the Court would have decided differently if the case had been brought before the I.C.J. earlier. Nevertheless, the interjudicial perspective existed in this case.

different ways of communicating and emphasizes the necessity for stronger international ties. The Supreme Court's attitude resembles an old-fashioned instinctive reaction to any kind of international impact, even if it is benign and in the interest of many. Moreover, the Supreme Court was not addressed directly by the I.C.J., nor could the I.C.J. do that. These decisions are always left to the nation to decide who is the real addressee. It means that the Supreme Court would have just offered a helping hand with respect to court to court relations. One reason why the I.C.J. does not address any branch of the federal government specifically is to avoid the invocation of the doctrine of separation of powers as an excuse. International interest can be, and should be, pursued through national actions.[276] Interest-balancing in *Breard* ended up as a dispute between provincialism and globalization.[277] It seems that only Justice Breyer saw no threat in taking the international proceeding into account, which certainly merited more careful deliberation.[278]

Certain tendencies indicate the rise of a new phenomenon: transjudicial communication.[279] An examination of the logical outcome of globalization shows how comity, as a bridge, being an exclusive U.S. institution, becomes a new pattern for international relations on the judicial level. All comity elements are present where law and policy work together.[280] As U.S. courts are well acquainted

---

276. *See* FALK, *supra* note 157, at 174. According to Falk,

> There is a pressing present need for a deeper understanding of certain common interests among nations—interests so important that they take precedence over differences in ideology, wealth, culture, and power. The United States, as a dominant actor with an obvious interest in preserving a stable international environment, has a special opportunity and responsibility to clarify the area of common interests. The settlement of controversies involving applications of international law in domestic courts provides the occasion.

Id.

277. *See* Richardson III, *supra* note 28, at 121 ("The U.S. actions [in *Breard*] were the latest in a series of U.S. assertions of a pretended norm that American Exceptionalism is superior to international law.").

278. *See* William J. Aceves, *The Vienna Convention on Consular Relations: A Study of Rights, Wrongs, and Remedies (Postscript)*, 31 VAND. J. TRANSNAT'L L. 257, 322-23 (1998).

279. *See* Anne-Marie Slaughter, *A Tipology of Transjudicial Communication, in:* INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 37 (Franck & Fox eds., 1996).

280. *See* Paul, *supra* note 247, at 6 ("[C]ourts often use comity to relate different categories of law and policy, for example at the border of law and public policy, public and private law, domestic and international law, and law and international

with this doctrine, they should have employed it adequately:

> The result strikes an ideal balance between national and international interests, eschewing the centralizing tendencies of many public international lawyers (often hand in hand with private actors enmeshed in globalization processes), while maintaining a genuine international spirit.[281]

As an open-ended concept, comity would have enabled the *Breard* court to measure the legal and political implications for the domestic and international actors, and to recognize the decision of the I.C.J., not out of a sense of obligation, but out of deference.

V. The Character of the Legal Arguments

Breard revealed the bipolarity of international law and its legal techniques. The adversaries employed arguments stemming from different legal environments and rhetorics. Given this perspective, *Breard* actually showed a deep and systematic disagreement between international and domestic law. The original approach of both sides was already in conflict. All other circumstances and developments of the case simply contributed to the initial discrepancy.

A. The Character of the United States' Legal Arguments

The United States insisted on an argument that had exclusively inward validity, based solely on the features of its domestic legal system. Presenting the case in restrictively domestic scenery, the emphasis was on the corresponding arguments. The United States offered an apology to Paraguay as the only possible remedy on the international plane.[282] On the other hand, the criminal offense committed had an aggravated character with a very strong domestic interest to punish it. That interest turned out to be the highest value uncompromisingly protected. The separation of powers and federalism allegedly limited the federal government's ability to interfere efficiently in the resolution of the problem. This shifts the

---

politics.").

281. Slaughter, *supra* note 279, at 68.

282. Concerning the Vienna Convention on Consular Relations, (Para. v. U.S.), Oral Pleadings, CR 98/7, para. 3.19 ("The United States contends that the solution to such a breach of the treaty's requirements is to be pursued through normal processes of diplomatic apology, consultation and improved implementation."). *See also* Concerning the Vienna Convention on Consular Relations, (Para. v. U.S.), 1998 I.C.J. 266 (Apr. 9), para. 29.

issue from federal to state affairs, which is quite surprising for the U.S.-established allocation of foreign relations powers. Great deference was given to the domestic presumption of the effects of the proposed international remedy (*status quo ante*), which stated that this would not have changed the outcome of the proceeding. Furthermore, the U.S. courts relied heavily on the procedural points envisaged in the Antiterrorism and Death Penalty Act, which limited the right to appeal. This procedural default doctrine caused the treaty violation (Breard could not remedy the violation of his right under the treaty due to procedural rules of the forum state). The United States refused to rectify the procedural impediment to respond to the international legal request, defending it by the presumed reasonable diligence of Breard's attorneys.[283] This was another domestic presumption that discharged the authority of the I.C.J. The message of the holding is that the procedural default and last-in-time rule can defeat an individually based treaty right.[284]

Arguments before the I.C.J. preserved the same character, having focused mostly on procedural issues. The interesting point is that the United States saw the order as focused on the domestic criminal justice system. Meanwhile, "the [I.C.J.] made it clear that the case does not concern the right of . . . states to resort to the death penalty and that the Court's function is to resolve international legal disputes between sovereign states and not to act as a universal supreme court of criminal appeal."[285] Furthermore, the order was denied effect due to its allegedly non-binding language[286] and the procedural default by Paraguay to initiate the procedure before the

283. As Charney and Reisman note,

> The Fourth Circuit, however, had earlier rejected the claim that a state's failure to advise a petitioner of his rights under the Vienna Convention could constitute cause for failure to raise the claim in state court, because "a reasonably diligent attorney would have discovered the applicability of the Vienna Convention to a foreign national defendant."

Charney & Reisman, *supra* note 101, at 668.

284. Article 36(2) of the Consular Convention provides, "Laws and regulations must enable full effect to be given to the purposes for which the rights accorded . . . are intended." "Applied to Consular Convention claims, the 'default' doctrine would be inconsistent with such a mandate, since 'full effect' would not be given to the purposes at stake, which concern the rights to be notified, to communicate and to have consular assistance." Paust, *supra* note 81, at 692.

285. Bekker & Highet, *supra* note 3, at 38.

286. The standard phrase, "to undertake all necessary measures at its disposal," was seen as individual and non-binding; the Executive Branch interpreted the standard restrictively.

U.N. Security Council for its enforcement.[287] The United States blurred the binding effect and enforceability of the I.C.J. decisions in this case.

B. The Character of Paraguay's Legal Arguments

Paraguay strongly advocated genuine international legal arguments. It insisted that the only possible way to remedy the violation of the Vienna Convention was to give the order full effect by granting the stay of Breard's execution. Having claimed the double international interest—as a state party to treaties at stake, and as Breard's protector—Paraguay performed a multiple-treaty strategy, invoking the Vienna Convention on Consular Relations (and its Optional Protocol), the I.C.J. Statute, and the U.N. Charter.

The main clash of arguments referred to the relevance of internal law to international law. Paraguay argued that domestic law was a device for the implementation and enforcement of international law. This deference was not absolute, but functional. It strongly opposed the international validity of the "procedural default" doctrine not only because it has an exclusively domestic origin, but also because "[t]he [I.C.J.], whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law."[288] Therefore, the domestic law defense is a weak argument, as it cannot be an excuse for non-compliance with international law.[289] It cannot preclude the full effect of a treaty in internal law, nor can it serve as an excuse for the

---

287. Paraguay invoked the "enforcement provision" in Article 94(2) of the U.N. Charter.

288. The Mavrommatis Palestine Concessions, (Greece v. Gr. Brit.), 1924 P.C.I.J. (ser. A) No. 2, at 34 (Aug. 30). This holding was repeated in several later cases. *See, e.g.*, Certain Polish Interests in Polish Upper Silesia (Ger.y v. Pol.), 1925 P.C.I.J. (ser. A) No. 6 (Aug. 25); Certain Polish Interests in Polish Upper Silesia (The Merits) (Ger. v. Pol.), 1925 P.C.I.J. (ser. A) No. 7 (May 25); Concerning the Northern Cameroons, (Cameroon v. U.K.), 1963 I.C.J. 15 (Dec. 2).

289. Although Paraguay advocated exclusively international legal argument basing its claims solely on the I.C.J. decisions, it is in accordance with the official statement of the U.S. State Department. As Franck and Glennon note,

> According to the Department of State, article 27 of the Convention on the law of treaties "restates the long standing principle of customary international law as justification for its failure to perform a treaty." This, the Department has noted, is "consistent with United States practice over many years in declining to accept provisions of internal law as justifying non-performance by a State of its treaty obligations to the United States."

Franck & Glennon, *supra* note 64, at 284.

violation of international law.[290]

Finally, Paraguay's concept of state responsibility reflected a well established doctrine pertaining to this issue: a sovereign state on the international plane is the sole subject of international law, accountable for the acts of all state organs and agencies, as well as for the acts of its federal units.[291] Having reached the international plane, Paraguay was not addressing any particular entity within the United

---

290. The S.S. "Wimbledon," (U.K., Fr., Italy, & Japan v. Ger.), 1923 P.C.I.J. (ser. A) No. 1, at 29 (Aug. 17); Free Zones of Upper Savoy and the District of Gex, 1930 P.C.I.J. (ser. A) No. 24, at 12 (Dec. 6); Greeco-Bulgarian Communities, 1930 P.C.I.J. (ser. B) No. 17, at 32 (July 31); Fisheries Case, (U.K. v. Nor.), 1951 I.C.J. No. 5, at 131 (Dec. 18). This customary international rule was spelled out and codified in Article 27 of the Vienna Convention on the Law of Treaties, 1969.

291. The Draft Articles on the State Responsibility of the UN International Law Commission, which is considered to be the codification of customary international law, confirms this rule:

> Article 5 (Attribution to the State of the conduct of its organs)
>
> For the purposes of the present articles, conduct of any State organ having that status under the internal law of that State shall be considered as an act of the State concerned under international law, provided that organ was acting in that capacity in the case in question.
>
> Article 6 (Irrelevance of the position of the organ in the organization of the State)
>
> The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character, and whether it holds a superior or a subordinate position in the organization of the State.
>
> Article 7 (Attribution to the State of the conduct of other entities empowered to exercise elements of the government authority)
>
> 1. The conduct of an organ of a territorial governmental entity within a State shall also be considered as an act of that State under international law, provided that organ was acting in that capacity in the case in question.
>
> 2. The conduct of an organ of an entity which is not part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall also be considered as an act of the State under international law, provided that organ was acting in that capacity in the case in question.

Draft Articles on the State Responsibility of the UN International Law Commission, 37 I.L.M. 440 (1998). Roberto Ago, who was a special rapporteur, explained the exact meaning of the territorial unit, as envisaged in the present Draft Articles. The territorial unit of the State comprises municipality, province, region, canton, federal unit, autonomous administration of dependant territory, etc. *See* Robert Ago, Third Report on the Responsibility of States, YILC/II, 1976, at 33. For a detailed discussion of this issue, see Verdross, *supra* note 215, at 338.

States' jurisdiction.[292] The claim was directed to the United States as a whole. "The traditional formal requirements that govern the presentation of an international claim presuppose a basic deference to the state as the center of authority."[293]

C. *The Intersection, Conflict and Reconciliation of the Different Approaches*

The opponents used extreme international and domestic arguments to defend the values and interests they pursued, presenting them as the highest values to be protected. Similarly, the arguments employed were placed on the most remote points of the individualism-communitarian correlation, which depends on the values the arguments aim to protect. Every time a state strives to protect exclusively domestic interests as opposed to international ones, it takes an individualistic approach, and vice versa. This opposition can be seen in other contexts as well, such as in the procedural-substantive or horizontal-vertical perspectives. All these co-relations comprise internal tension and alienation.

Having followed these patterns, both the United States and Paraguay deployed techniques different by their legal nature. These arguments with contrasted origins were not given their full legal effect in the opposite system and vice versa, which eventually deprived them of the legal sharpness and effectiveness they pursued. Paraguay used an extremely international, communitarian, substantive, and values-based approach, whereas the United States chose an internal, individualistic, procedural, and self-interest-based attitude.

The difference in strategies is understandable to a certain extent. Paraguay's interest was identical to the values protected by international law—consular relations and consuls' functions, diplomatic protection, international human rights standards, and due respect for international legal commitments and international courts. The United States tried to have the issue of exclusive domestic jurisdiction revisited, as it is exempt from the international regulation.[294] Therefore, it put forward corresponding arguments insisting on the criminal justice system, domestic procedural rules, the

292. However, Paraguay analyzed the internal structure and U.S. legal remedies to a certain extent in order to obtain the provisional measures order. *See* Richardson III, *supra* note 28, at 127.

293. FALK, *supra* note 157, at 24.

294. U.N. Charter art. 2, para. 7.

independence of the courts, and constitutional structural limitations. Both parties were more focused on the grounds of these arguments than on the arguments presented by the opposing side, thus, failing to respond to them directly.

There is only one aspect in which the two parties changed their domestic-international positions. Paraguay chose a vertical approach, more concomitant with the structure of the internal legal argument, whereas the United States advocated the horizontal one. Horizontal-vertical dualism is just one of the explanations of the coordination/subordination features of different legal systems. Unlike in other instances, the United States insisted on a communitarian and coordinative approach, implying that consensus is necessary for every step undertaken on the international plane.

Both arguments were presented to different courts without substantive changes. Each argument fit well together only with the court coming from the same legal environment. The values that were seen as highest before the international courts were not given any kind of deference in the domestic legal system. Having responded to the new trends in international law, the I.C.J. has gone further. "For the first time, the I.C.J. has shown and unanimously accepted a jurisdictional pathway to assess under international law the fairness of a verdict by a subfederal unit of a national state about criminal liability."[295] The origin of the principle is old, as established in the *Factory at Chorzow* case: "The judgments of domestic courts cannot invalidate the judgment of an international tribunal."[296] The intersection of these arguments can be clearly seen on the national level, since countries exist as legal persons on both internal and international levels, which increases their responsibility in both legal systems. Reconciliation is usually found in the mid-point of the conflicting relationship, when opponents try to find arguments that bridge the gap between the two different concepts and legal systems where they come from.

Conclusion

This article attempts to show that there were other possible solutions to the *Breard* drama. Most of them could be found in taking different approaches within the U.S. legal system, since a

295. Richardson III, *supra* note 28, at 129.

296. Factory at Chorzow, (Ger. v. Pol.), 1927 P.C.I.J., (ser. A) No. 17, at 33 (July 26).

considerable part of the case involved many domestic actors. The U.S. legal system offers many other problem-solution tools and devices that would have made respect for both domestic and international law possible in *Breard*.

The United States used an exclusively domestic argument, although an international legal argument of domestic origin was at its disposal. This is the best and most effective argument in the whole case, as it is the only one able to respond to the demands of both systems and avoid the conflict between the international and domestic legal systems.

Either the Court or the executive could have achieved reconciliation in this manner. The choice actually depends on the starting viewpoint with respect to the whole problem. If the interest-balancing, policy-oriented, and horizontal approach is perceived as better,[297] the executive naturally comes into play, as it falls within the regular executive function on both the domestic and international level. On the other hand, the courts might be better able to solve the problem if the rights-based, vertical approach is thought to be a better solution. While the executive could perform regular executive functions, the judiciary might respond to the trend of globalization by transjudicial communication. Professor Falk referred to this judicial activism in the analysis of the *Sabbatino* case:

> It is symbolic because it raises such fundamental issues concerning the degree of judicial independence in litigation involving rules of international law. It is also symbolic because the decision reflects the extent to which domestic courts are prepared to give valid effect to acts performed by other social systems committed to values incompatible with their own. Tolerance for incompatible values is a precondition for harmony in a world composed of diverse social systems. Judicial awareness of this need for tolerance is itself an important step in the direction of adapting international law to changes in international environment. These issues are present in many contexts of interaction other than *Sabbatino*. The reasoning used here is transferable. No decision by the Supreme Court will settle these problems, for they go the heart of the management of international conflict in our times.[298]

The Supreme Court was faced with both horizontal and vertical aspects of international adjudication. The horizontal aspect appeared

297. *See* Bradley & Goldsmith, *supra* note 134, at 679.

298. FALK, *supra* note 157, at 137-38.

in the United States' and Paraguay's relationship before and with the I.C.J., whereas the vertical has come into existence by introducing Angel Breard to the international context and Paraguay's interest in that respect. Such complexity left different options for the Court to deal with this issue. It could have adopted Professor Koh's approach to international adjudication, which emphasizes the horizontal and public law approach, introducing political elements in dispute settlement procedure that inevitably shifts the issue to the executive branch.[299] This approach emphasizes that international law deals only with states as international subjects. On the other hand, this option can fracture the normative aspects of the domestic/international law relationship,[300] making it more political and more difficult for international law to be implemented in domestic law systems. However, the Court could have adopted Professor Brilmayer's approach regarding international adjudication, relying on private rights and vertical structure, which introduces more legal elements with parallels in domestic constitutional cases.[301]

The United States and Paraguay were both right and wrong in advocating and developing their arguments. Paraguay was right to pursue the international law claims, but certain reliance on domestic law is inevitable, permissible and desirable. On the other hand, such reliance is not absolute, as the United States explained, but rather functional.

The discretion of a state is only limited by prohibitive rules. Every state remains free to adopt principles that it regards as best and most suitable. All that can be required of a state is that it not overstep the limits that international law places upon its jurisdiction. Within these limits, its title to exercise jurisdiction rests in its sovereignty.[302]

The countermajoritarian difficulty seems to have arisen in this case—Congress stayed silent regarding the *Breard* incident, although the particular decision of the I.C.J. relied upon an international treaty

299. *See generally* Harold H. Koh, *Civil Remedies for Uncivil Wrongs: Combating Terrorism Through Transnational Public Law Litigation*, 22 TEX. INT'L L. J. 169, 200 (1987); HAROLD H. KOH, THE RESPONSIBILITY OF THE IMPORTER STATE IN TRANSFERRING HAZARDOUS TECHNOLOGIES AND SUBSTANCES: THE INTERNATIONAL LEGAL CHALLENGE 170, 194 (G. Handl & R. Lutz eds., 1989); Koh, *supra* note 68. For further commentary, see Brilmayer, *supra* note 105, at 2313-14.

300. *See* Franck & Fox, *supra* note 154, at 5.

301. *See* Brilmayer, *supra* note 105, at 2312-14.

302. See S. S. Lotus (Fr. v. Turk.), 1927 P.C.I.J., (ser. A) No. 10, at 19.

to which the United States is a party. However, the Supreme Court did not respect Congress' will in that respect.

The question of who the addressee was has been answered. The I.C.J. neither could nor wanted to address the domestic courts directly. The I.C.J. addressed the nation as a whole, and if one really wishes to identify the most suitable addressee, even in the eyes of the I.C.J., the executive appears to be it. The vertical approach to the problem involves a possible jurisdictional overlap, and "where such an *incompatible overlap* is discerned, the most effective modes of adjustment appear to be strongly horizontal in character."[303] Still, it need not be the relationship of conflict, as the activism of the American courts can always introduce transjudicial communication by being responsive to the holdings of the World Court.

The political implications of *Breard* are obvious. Apart from the deterioration of the United States' international reputation and its diplomatic relations with Paraguay, the case indicated the undesirable tendency confirmed in *LaGrand*, pending before the I.C.J. Domestic citizens may find themselves denied access to consular services in foreign countries where U.S. diplomatic protests will certainly have less legitimacy and persuasiveness. In addition, the U.S. position in seeking remedies before the I.C.J. in future cases may deteriorate due to the manifest disrespect for this institution. "A reputation for playing fast and loose with treaty commitments can only do harm to our capacity to be a leader in the post-Cold War world."[304]

International law heavily relies upon national legal systems and courts. Nations should try to develop better arguments for obeying international law, taking into account common international interests and globalization as an ongoing and beneficial process. National courts should defer to international law, or at least take a more considerate approach when dealing with both national and international interests. Such deference is not only beneficial for the international courts, but for state members as well. An effective international legal order should be seen as not only important *per se*, but also as essential for the states themselves when pursuing their individual interests.

303. FALK, *supra* note 157, at 27 (emphasis in original).

304. Detlev F. Vagts, *Taking Treaties Less Seriously*, 92 AM. J. INT'L L. 458, 462 (1998).